(25,670)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 840.

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY, LESSEES OF GEORGIA RAILROAD & BANKING COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

O. Y. LAYTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

INDEX

	Original.	Print
Writ of error	1	1
Citation and service	4	2
Petition for writ of error	7	3
Order allowing writ of error	9	4
Bond on writ of error	11	5
Assignment of errors	15	6
Præcipe for record	27	13
Transcript of record from the Superior Court of Fulton County.	30	14
Bill of exceptions	30	14
Judge's certificate	36	17
Petition	41	18
Summons and return	47	21
Demurrer of Atlantic Coast Line R. R. *et al.*	49	22
Demurrer of Louisville & Nashville R. R. Co.	54	24
Answer of Atlantic Coast Line R. R.	58	26
Answer of Louisville & Nashville R. R. Co.	64	29
Orders on demurrers	67	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 18, 1917.

	Original.	Print
Exceptions *pendente lite*, Louisville & Nashville R. R. Co...	68	30
Judge's certificate	69	31
Amended petition	70	31
Exceptions *pendente lite*	73	33
Judge's certificate	74	33
Verdict	75	33
Judgment	75	33
Motion for new trial	76	34
Order on motion for new trial	77	34
Amended motion for new trial	79	35
Order on amended motion for a new trial	94	43
Judgment on motion for new trial	95	43
Charge to jury	96	44
Brief of the evidence	136	63
Testimony of O. Y. Layton	136	63
Dr. E. F. Fincher	146	68
Mrs. O. Y. Layton	150	70
Dr. W. P. Nicolson	150	70
Dr. W. S. Elkin	158	73
Dr. J. R. Garner	165	77
W. K. Speer	169	79
Dol Asbury	171	81
W. L. Cheeves	172	81
J. R. Turner	174	82
J. C. Matthews	177	83
Arthur Dodgen	177	84
E. L. Hogg	180	85
J. C. Matthews (recalled)	182	86
M. F. Veal	183	87
Arthur Dodgen (recalled)	185	87
Certificates to evidence, &c.	185	88
Clerk's Certificate	186	88
Judgment	187	88
Opinion *per curiam*	188	89
Clerk's certificate	190	90

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad and Banking Company, Atlanta and West Point Railroad Company and Louisville and Nashville Railroad Company, plaintiffs in error, and O. Y. Layton, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity
2 was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, lessees of Georgia Railroad and Banking Company, and Atlanta and West Point Railroad Company, and Louisville and Nashville Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of November, in the year of our Lord one thousand nine hundred and sixteen.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by
WM. H. FISH,
Chief Justice of the Supreme Court of Georgia.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk, Supreme Court of Georgia.

3 [Endorsed:] Supreme Court of the United States, October Term, 191–. Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, lessees of Georgia Railroad and Banking Company, Atlanta and West Point Railroad Company, and Louisville and Nashville R. R. Company vs. O. Y. Layton. Writ of Error.

4 UNITED STATES OF AMERICA, *ss:*

To O. Y. Layton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Georgia wherein Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad and Banking Company, and Atlanta and West Point Railroad Company, and Louisville and Nashville Railroad Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Fish, Chief Justice of the Supreme Court of the State of Georgia, this 20th day of November, in the year of our Lord one thousand nine hundred and sixteen.

WM. H. FISH,
Chief Justice of the Supreme Court of the State of Georgia.

5 On this 21st day of November, in the year of our Lord one thousand nine hundred and sixteen, personally appeared Charles Clark before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Marion Smith, Attorney for O. Y. Layton.

CHARLES CLARK.

Sworn to and subscribed the 21st day of November, A. D. 190–.

[Seal of Edgar A. Neely, Notary Public, Fulton County, Georgia.]

EDGAR A. NEELY,
Notary Public, Fulton County, Ga.

Due and legal service of the within citation acknowledged, and copy thereof received. All other and further service and notice waived.

This 21st day of Nov., 1916.

MARION SMITH.
Attorney for O. Y. Layton, Defendant in Error.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk, Supreme Court of Georgia.

6 In the Supreme Court of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST Line Railroad Company, Lessees of Georgia Railroad & Banking Company; Atlanta & West Point Railroad Company, and Louisville & Nashville Railroad Company, Plaintiffs in Error,

vs.

O. Y. LAYTON, Defendant in Error.

Acknowledgment.

Due and legal service of the citation, petition for writ of error, assignment of errors, and all other proceedings connected with the writ of error from the Supreme Court of the United States to the Supreme Court of the State of Georgia in the above case is acknowledged; all other and further service waived.

This 21st day of November, 1916.

MARION SMITH,
Attorneys for Defendant in Error.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk Supreme Court of Georgia.

7 In the Supreme Court of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST Line Railroad Company, as Lessees of Georgia Railroad & Banking Company; Atlanta & West Point Railroad Company, and Louisville & Nashville Railroad Company, Plaintiffs in Error,

vs.

O. Y. LAYTON, Defendant in Error.

Petition for Writ of Error.

Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, the above named Plaintiffs in Error, respectfully show:

That on the 23rd day of September, 1916, the Supreme Court of the State of Georgia, which is the highest court in said State in which

a decision in the action referred to herein could be had, rendered a judgment against your petitioners in a certain action originally brought in the Superior Court of Fulton County, Georgia, in which O. Y. Layton was plaintiff and your petitioners, Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, were defendants.

In said action certain rights, privileges and im-unities were duly and specially set up and claimed by your petitioners under
8 the Constitution and under the Statutes of the United States, and the decision of the said Supreme Court of Georgia was against the rights, privileges and immunities so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herein and herewith.

Wherefore and inasmuch as your petitioners feel aggrieved by the final decision of the Supreme Court of the State of Georgia in rendering judgment against them in this action, they respectfully pray that writ of error may issue from the Supreme Court of the United States to the Supreme Court of the State of Georgia for the correcting of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of the State of Georgia may be sent to the Supreme Court of the United States, and that the decision and judgment of the said Supreme Court of the State of Georgia therein may be reversed and annulled.

This 12th day of October, 1916.

McDANIEL AND BLACK,
Attorneys for Louisville & Nashville Railroad Co. and Atlantic Coast Line Railroad Co., Lessees of Georgia Railroad & Banking Co.
DORSEY, BREWSTER, HOWELL AND HEYMAN,
Attorneys for Atlanta & West Point Railroad Co.
TYE, PEEPLES AND TYE,
Attorneys for Louisville & Nashville Railroad Company.

9 & 10 In the Supreme Court of the State of Georgia.

Let the Writ of Error above prayed for be issued upon the execution of the bond by Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, payable to O. Y. Layton, his heirs, executors, administrators and assigns, in the sum of Fifteen (15) Thousand Dollars, such bond, when approved, to act as a supersedeas.

This 20th day of November, 1916.

WM. H. FISH,
Chief Justice of the Supreme Court of the State of Georgia.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk, Supreme Court of Georgia.

10½ (Endorsed:) In the Supreme Court of Georgia. Louisville and Nashville Railroad Co. and Atlantic Coast Line Railroad Co., Lessees of Georgia Railroad and Banking Co. Atlanta and West Point Railroad Co., Louisville and Nashville Railroad Co., Plaintiffs in Error, versus O. Y. Layton, Defendant in Error. Petition and order for Writ of Error.

11 In the Supreme Court of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, as Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company, and Louisville & Nashville Railroad Company, Plaintiffs in Error,

vs.

O. Y. LAYTON, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That We, Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, and J. W. English, a citizen, of the State of Georgia, are held and firmly bound unto O. Y. Layton, his heirs, executors, administrators and assigns, in the full and just sum of Fifteen Thousand Dollars, for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves and our respective successors firmly by these presents.

Whereas, lately at a hearing before the Supreme Court of the State of Georgia, in a suit depending in said Court between the said O. Y. Layton and the said Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, a final judgment
12 was rendered against Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, and the said Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company seek to prosecute their writ of error to the Supreme Court of the United States to reverse said final judgment;

Now therefore, the condition of this obligation is such that if the said Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville &

Nashville Railroad Company, shall prosecute their said writ of error to effect and answer all costs and damages that may be adjudged against them if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, the said Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad and Louisville & Nashville Railroad Company, as principals, and J. W. English, as security, have hereunto set their hands and
13 & 14 seals, this 20th day of November, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY,
Lessees of Georgia Railroad and Banking Co.,
By E. R. BLACK, *Their Attorney.*
ATLANTA AND WEST POINT RAILROAD COMPANY,
By BREWSTER, P. H., *Its Attorney at Law.*
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By JOHN L. TYE, *Its Attorney at Law.*
J. W. ENGLISH, *Security.*

The foregoing bond is hereby approved and it is ordered that the same operate as a supersedeas.

November 22, 1916.

WM. H. FISH,
Chief Justice of the Supreme Court of the State of Georgia.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk, Supreme Court of Georgia.

14½ (Endorsed:) In the Supreme Court of Georgia. Louisville and Nashville Railroad Co. and Atlantic Coast Line Railroad Co., Lessees of Georgia Railroad and Banking Co., Atlanta and West Point Railroad Co., Louisville and Nashville Railroad Co., Plaintiffs in Error, versus O. Y. Layton, Defendant in Error. Supersedeas Bond.

15 In the Supreme Court of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company; Atlanta & West Point Railroad Company, and Louisville & Nashville Railroad Company, Plaintiffs in Error,

vs.

O. Y. LAYTON, Defendant in Error.

Assignment of Errors to the Supreme Court of the United States.

This was a civil action instituted by the plaintiff, O. Y. Layton, against the defendants, Louisville & Nashville Railroad Company

and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, in the Superior Court of Fulton County, Georgia, to recover damages alleged to have been sustained by Layton in the service of the named Railroad Companies as a switchman in the yard operated by them jointly in Atlanta, Georgia, on August 27th, 1913.

The suit as brought was projected in two counts. The first count was based on the statute law of the State of Georgia. The second count set up that Layton at the time of his injuries was engaged in interstate commerce and that the Railroad Companies were also at the time engaged in interstate commerce, thus seeking in this second count to make applicable the Act of Congress approved April 22nd, 1908, the same being "An Act relating to liability of common carriers by railroads to their employees in certain cases," which
16 as amended by the Act of Congress approved April 5th, 1910, is generally known as "The Federal Employers' Liability Act."

In the suit when tried there was no evidence as to the character of commerce in which the parties were engaged at the time of Layton's injuries. The evidence was silent as to whether such commerce was intrastate or interstate. In this situation the trial court submitted both counts of the petition to the jury, and the jury found in favor of plaintiff Layton on the first count based on the State law.

In his petition Layton alleged that he was a switchman on top of a cut of freight cars for the purpose of releasing the brakes on said cars, so that an engine of defendant Railroad Companies might couple thereto and remove them, and while so engaged an engine of defendant Railroad Companies approached the cut of cars to couple them and struck the cars a violent, unusual and unnecessary blow; that the cars failed to couple by impact and were knocked on down against other cars on the same track, and at the time of striking these other cars Layton was thrown from the top of the car upon which he was riding and was injured.

Layton's allegations of negligence were:

(1) That the cars and engines were not equipped with automatic couplers which would couple with each other by impact; (2) that the engine struck the cars a violent, unusual and unnecessary blow when it attempted to couple to them; (3) that the engine was not equipped with a power driving brake wheel. There was no evidence to support this third ground of negligence and it was abandoned by Layton during the trial.

After the verdict and judgment against them defendant Railroad Companies sued out a bill of exceptions which, being properly certified, operated as a writ of error to carry the case to the Supreme Court of Georgia, the judgment of the lower court having been affirmed by the Supreme Court of Georgia on September 23rd 1916.

Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville &

Nashville Railroad Company, Plaintiffs in error in the Supreme Court of Georgia and Plaintiffs in error in the Supreme Court of the United States, respectfully assign as errors in the record and in the proceedings in this cause in the Supreme Court of Georgia the following.

1.

The Supreme Court of Georgia erred in holding that "evidence that plaintiff was injured in the switching yards of the defendants in the City of Atlanta by an engine and cars of the defendants which he was engaged in operating for them will support a verdict for the plaintiff, where otherwise authorized under the first count (Statute Law of Georgia), without evidence showing affirm-
18 atively that the parties were not engaged in interstate commerce at the time of the injury."

Such holding was erroneous, in view of the fact that Layton had brought his suit in two counts, one under the Federal law and one under the State law. Both laws were the laws of the forum. The burden is upon plaintiff to show by the evidence which law was applicable. This burden he failed to carry. The Federal law, if applicable, was superior and exclusive. Defendant Railroad Companies were entitled to have the Federal Law applied if it was applicable and were entitled to have plaintiff Layton produce evidence showing that it was not applicable, if a recovery was to be sustained under the first count based on the State law.

On account of the error assigned defendant Railroad Companies were deprived of the rights, privileges and immunities which they possessed and to which they were entitled under the Act of Congress of April 22nd, 1908, as amended on April 5th, 1910, which Act and Amendment were passed by the Congress of the United States under the power and authority derived by it in Article 1, Section 8, Clause 3, of the Constitution of the United States, which Act is generally known as "The federal Employers' Liability Act."

The construction and application of this Statute of the United States (if Layton had carried the burden of the law cast
19 upon him and had shown the character of the commerce in which he was engaged at the time of his injury, and such evidence had shown it was interstate) as insisted upon by plaintiffs in error and denied by said Supreme Court of Georgia, would or might have led to a judgment in their favor.

2.

The Supreme Court of Georgia erred in holding as follows:

"The Safety Appliance Act of March 2nd, 1893, (27 Statutes, 531, c. 196) as amended by the Act of March 3rd, 1903, (32 Statutes 943, c. 976) imposes a duty on freight common carriers engaged in interstate commerce by railroad to equip its cars with brakes, etc., as therein provided, and this demand of the Statute applies to the cars of such interstate carriers engaged in transport-

ing intrastate freight. Southern Ry. Co. vs. Indiana R. R. Com., 236 U. S. 439; Southern Ry. Co. vs. U. S., 222 U. S. 20.

"The design of the statute is for the protection of the employees of an interstate carrier engaged in the operation of its cars, whether such cars were transported in intrastate or interstate freight. A brakeman whose duty it is to assist in the coupling of cars comes within its protection and if such brakeman is injured in the discharge of his duties connected with making up trains, which is accomplished by the coupling or uncoupling of cars, and his injuries are due to the fact that the cars are not equipped as required by the statute, in the absence of other facts discharging liability, the plaintiff may recover for such injuries. This case differs in facts from St. Louis & San Francisco Ry. Co. vs. Canarty, 238 U. S. 243."

Such holding was erroneous because under the evidence the plaintiff Layton was not injured while engaged in coupling or uncoupling *or uncoupling* cars. He was injured while engaged in his duty as brakeman in letting off brakes on the tops of cars. The Statute involved in this holding was Section 2 of the Act of Congress approved March 2nd, 1893, and amended April 1st, 1896, March 2nd, 1903, and April 14th, 1910, which Acts of Congress comprise what is known as "Federal Safety Appliance Act," which forbids the use by railroads and common carriers subject to such Acts of any car
20 "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

This plaintiff Layton at the time of his injury was not at a place and so engaged, according to the undisputed evidence, as to place him within the purview or protection of said Federal Safety Appliance Act known as the Automatic Coupling Act, so as to make the defendant Railroad Companies liable to him for a failure of duty on their part with respect to a compliance with such Federal Safety Appliance Law.

On account of the error assigned defendants, Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad and Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, were deprived of the rights, privileges and immunities which they possessed and to which they were entitled under a proper construction and application of the said Act of Congress. The construction of the said Statute of the United States, as insisted upon by plaintiffs in error and denied by said Supreme Court of Georgia, would or might have led to a judgment in their favor.

3.

The Supreme Court of Georgia erred in holding that the trial court did not err, but currectly charged the jury with the following instructions, to wit:

21 (*a*) "The law (Georgia State Law) under consideration provides further 'that in any action brought against any common carrier under and by virtue of the two preceding sections

to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury of such employee.' "

(*b*) "The fact that the employee may have been guilty of contributory negligence not amounting to a failure to exercise ordinary care would not be a bar to recovery, but the damages would be diminished by the jury in proportion to the amount of negligence attributable to him. As before stated, no such employee who may be injured shall be held to be guilty of contributory negligence in any case where the violation by such common carrier of a statute enacted for the safety of employees caused or contr-buted to the injury of such employee."

(*c*) "I have already explained to you what the situation would be as to his contributory negligence and assumption of risk, if the plaintiff's injuries were produced by defects or by a failure rather of the defendants to furnish appliances, safety appliances, required by law."

(*d*) "If you believe under the evidence and under this count (first count under the Georgia Law) that the defendants were negligent in the operation of their engines, cars and machinery, and not in respect to the appliances required by law, then the plaintiff would be entitled to recover, reducing his damages according to the proportion you believe negligence may be attributable to him; but, as before stated, if you believe the plaintiff is entitled to recover and that the defendants' negligence consisted of a failure to comply with any law enacted for the safety of employees and that negligence caused or contributed to the injury, then the plaintiff would be entitled to recover without diminution of damages on account of contributory negligence, if any such existed."

(*e*) "The general rule of law is that a servant—that is, an employee—assumes the risk of his employment and is bound to exercise his own skill and diligence to protect himself. That is the general rule and in this case and under this first count (count under the Georgia Law), if you believe this plaintiff was injured and his injuries were brought about by the negligence of the defendants as alleged in his petition, and that such negligence was not due to any defect or insufficiency due to its negligence in its cars, engines appliances or other equipment, then this general rule as to the assumption of risk by the plaintiff will apply."

The instructions marked respectively (*a*), (*b*), (*c*), (*d*) and (*e*) were erroneous because the plaintiff Layton was not injured while he was engaged in any task in connection with any safety appliance required by the statutes enacted for the safety of employees of railroads, and not being so engaged, did not come within the purview or protection of such statutes. These charges of the Court
22 were not pertinent to any issues in the case, because Layton was not engaged with any safety appliance at the time he was injured. The only violation of any statute enacted for the safety of employees which was relied upon by plaintiff Layton was

the alleged violation of Section 2 of the Act of Congress approved March 2nd, 1893, and amended April 1st, 1896, March 2nd, 1903, and April 14th, 1910, which Acts of Congress comprise what is known as the "Federal Safety Appliance Act," which forbids the hauling or using by railroads and common carriers subject to such Acts of any car "not equipped with couplers coupling automatically by impact and which can be "coupled without the necessity of men going between the ends of the cars." There was no evidence tending to show a violation of any State — enacted for the safety of employees except this provision of the Federal Safety Appliance Laws with respect to automatic couplers.

This plaintiff Layton at the time of his injury was not at a place and so engaged, according to undisputed evidence, as to place him within the purview of this Federal Act. The Court in giving the instructions complained of in this assignment of error misconstrued the Act of Congress relating to automatic couplers and misapplied the provisions of that Act.

The instructions of the Court marked respectively (*a*), (*b*), (*c*), (*d*) and (*e*) and embracing, as they did, a misconstruction and misapplication of this Federal Act, in their terms deprived
23 defendant Railroad Companies of their defenses of contributory negligence and assumption of risk, and instructed the jury, by misapplying and misconstruing this Federal Act, that in the event there was a violation of said Act the defendant Railroad Companies would have the advantage of neither of their defenses based upon the assumed *risk* of the plaintiff and his contributory negligence, and further prevented the jury in this view of the case from diminishing the damages to which plaintiff was entitled if he were guilty of contributory negligence, and further prevented the defense of assumption of risk from operating as a complete discharge *to* defendants' liability.

On account of the errors assigned in the above subdivisions (*a*), (*b*), (*d*) and (*e*), Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company were deprived of the right, privilege and immunity which they possessed and to which they were entitled under the Act of Congress approved March 2nd, 1893, and amended April 1st, 1896, March 2nd, 1903, and April 14th, 1910, known as Federal Safety Appliance Act, which forbids the hauling or using by railroads and common carriers subject to such Act of any car "not equipped with couplers coupling automatically by impact and which can be un-
24 coupled without the necessity of men going between the ends of the cars."

The construction of the Statutes of the United States above referred to as insisted upon by plaintiffs in error and denied by said Supreme Court of Georgia would or might have led to a judgment in their favor.

4.

Said Supreme Court of Georgia erred in affirming the judgment of the lower court and erred in rendering final judgment against defendant Railroad Companies, for the reasons hereinbefore assigned.

Wherefore, for these and other manifest errors appearing in the record, said Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, Plaintiffs in error, pray that the judgment of the Supreme Court of Georgia be reversed, set aside and held for naught, and that judgment be rendered for Plaintiffs in error, Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company, granting their rights under the Constitution and Statutes of the United States, and Plaintiffs in error also pray a judgment for their costs.

This 12th day of October 1916.

25 & 26 McDANIEL AND BLACK,
Attorneys for Louisville & Nashville Railroad Co. and Atlantic Coast Line Railroad Co., Lessees Georgia R. R. & Banking Co.

DORSEY, BRESTER, HOWELL AND HEYMAN,
Attorneys for Atlanta & West Point Railroad Company.

TYE, PEEPLES AND TYE,
Attorneys for Louisville & Nashville Railroad Company.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk, Supreme Court of Georgia.

26½ [Endorsed:] In the Supreme Court of Georgia. Louisville and Nashville Railroad Co. and Atlantic Coast Line Railroad Co., Lessees of Georgia Railroad and Banking Co., Louisville and Nashville Railroad Co., Atlanta and West Point Railroad Co., Plaintiffs in Error, versus O. Y. Layton, Defendant in Error. Assignment of Errors to the Supreme Court of the United States.

27 In the Supreme Court of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company; Atlanta & West Point Railroad Company, and Louisville & Nashville Railroad Company, Plaintiffs in Error,

vs.

O. Y. LAYTON, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of the State of Georgia:

The above named Plaintiffs in Error hereby direct you to forward to the Supreme Court of the United States with the writ of error the following parts of the record in this case:

(1) The bill of exceptions.

(2) The transcript of the record in the Supreme Court of the State of Georgia from the Superior Court of Fulton County, Georgia.

(3) The judgment and opinion of the Supreme Court of the State of Georgia.

(4) The original writ of error and citation based thereon.

(5) Copies of the petition for writ of error, with order allowing the writ of error, the bond, the assignments of error, and of this præcipe.

This 20th day of November, 1916.

TYE, PEEPLES AND TYE,
DORSEY, BREWSTER, HOWELL AND HEYMAN,
McDANIEL AND BLACK,
Counsel for Plaintiffs in Error.

28 & 29 Service of the foregoing præcipe hereby acknowledged, copy thereof received and all other and further notice and service thereof is waived.

We hereby agree that the record specified in the foregoing præcipe is all that is necessary to a clear understanding of the errors complained of.

This 20th day of November, 1916.

MARION SMITH,
Counsel for Defendant in Error.

Filed in office Nov. 21, 1916. W. E. Talley, Deputy Clerk, Supreme Court of Georgia.

29½ (Endorsed:) In the Supreme Court of Georgia. Louisville and Nashville Railroad Co. and Atlantic Coast Line Railroad Co., Lessees of Georgia Railroad & Banking Co., Atlanta & West Point Railroad Co., and Louisville & Nashville Railroad Co., Plaintiffs in Error, versus O. Y. Layton, Defendant in Error. Præcipe.

30 STATE OF GEORGIA,
Fulton County:

Fulton Superior Court.

No. 29692.

O. Y. LAYTON
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE Railroad Company, Lessees of Georgia Railroad & Banking Company; Louisville & Nashville Railroad Company, and Atlanta & West Point Railroad Company.

Be it remembered, that during the May Term, 1915, of the superior Court of Fulton County, Georgia, before the Hon. W. D. Ellis, Judge thereof, there came on to be heard the case of O. Y. Layton vs. Louisville & Nashville Railroad Company, and Atlantic Coast Line Railroad Company, as Lessees of Georgia Railroad & Banking Company, and Louisville & Nashville Railroad Company and Atlanta & West Point Railroad Company, the same being a suit for personal injuries alleged to have been sustained by the plaintiff on the 27th day of August, 1913, the suit being based upon two counts: the first count based upon the law of Georgia and the second count based upon the Act of Congress of 1908, as amended, known as the Federal Employers' Liability Act. Said case during said term was tried before a jury, and after evidence was introduced for plaintiff and defendants, and after argument and charge of the Court, the jury at said May Term, 1915, to wit: on June 8th, 1915, rendered a verdict in favor of the plaintiff and against the defendants for the sum of Thirteen Thousand Nine Hundred ($13,900.00) Dollars.

30½ The defendants thereafter, at the same Term of the Court and within the time prescribed by law, filed their motion for new trial and in connection with said motion for new trial filed a duly approved brief of the evidence and an amendment to their motion for new trial, as well as the approved charge of the Court. The grounds for the original motion and the amendment thereto have been duly approved and certified by the Court.

That said motion for new trial was heard on September 1st, 1915, and after consideration the Court on said date, to wit: September 1st, 1915, overruled said motion for new trial and entered its formal order overruling said motion and denying a new trial.

To this decision, judgment and order overruling their motion for new trial the defendants then and there excepted and now except to the same and assign error thereon, and for specific assignment of error say that the Court erred in overruling the said motion for new trial on each and all the grounds contained in the original and the amended motion, and defendants aver that said motion for new trial should have been granted on each and all the grounds contained in the original motion and the amendment thereto.

Be it further remembered, that defendants Louisville & Nashville

Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company filed their demurrer to the petition of plaintiff on November 3rd, 1913, and on December
31 10th, 1913, said demurrers were heard by Hon. J. T. Pendleton, Judge of the Superior Court of the Atlanta Circuit, the said Judge therein at that time presiding, and upon a consideration of the demurrer in question the Court, on December 10th, 1913, overruled certain paragraphs of said demurrer, to wit: paragraphs one, two, three, four, five and six of said demurrer, to which order, ruling and judgment of the Court in overruling the named paragraphs of their demurrer the defendants Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of the Georgia Railroad & Banking Company, and the Atlantic & West Point Railroad Company then and there excepted and now except to the same and assign the same as error, and the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company show that after the order of the court overruling their said demurrer was passed, at the same term of the Court at which the decision was made and order and judgment entered, and within the time required by law, they filed their exceptions pendente lite preserving of record their exceptions to the order overruling the named portions of their said demurrer and the errors assigned thereon, and the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company here and now assign error upon the specifications contained in said exceptions pendente lite.

32 Be it further remembered, That on the 12th day of November, 1913, defendant Louisville & Nashville Railroad Company filed its demurrer, and that upon a consideration of its said demurrer in question before Hon. J. T. Pendleton, Judge of said Court presiding therein, on December 10th, 1913, the Court on said date overruled paragraphs one, two, three, four, five and six of said demurrer, to which order, ruling and judgment of the Court in overruling its demurrer as aforesaid to the petition of the plaintiff, the Louisville & Nashville Railroad Company excepted and now excepts to the same and assigns the same as error, and the Louisville & Nashville Railroad Company shows that after the order of the Court overruling the named paragraphs of its said demurrer, at the same Term of the Court at which the decision was made and the order and judgment entered and within the time required by law, it filed its exceptions pendente lite, preserving of record its exceptions to the order overruling said portions of its said demurrer and the errors assigned thereon, and the Louisville & Nashville Railroad Company here and now assigns error upon the specifications contained in said exceptions pendente lite.

Defendants Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of Georgia Railroad &

Banking Company, the Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company specify the following portions of the record in said case as material to a clear under-
33 standing of the errors in this bill of exceptions complained of, to wit:

(1) The original petition in said case filed October 14th, 1913, with entry of service thereon.

(2) Amendment of plaintiff filed December 20th, 1913, together with order allowing same.

(3) Answer of Louisville & Nashville Railroad Company filed November 12th, 1913.

(4) Answer of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of Georgia Railroad & Banking Company, and Atlanta & West Point Railroad Company, filed November 3rd, 1913.

(5) Demurrer of Louisville & Nashville Railroad Company filed November 12th, 1913, together with order of court thereon of date December 10th, 1913.

(6) Demurrer of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company, filed November 3rd, 1913, together with order of court thereon of date December 10th, 1913.

(7) Exceptions Pendente Lite of Louisville & Nashville Railroad Company filed December 16th, 1913, together with certificate of the court thereon.

(8) Exceptions Pendente Lite of the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, and the Atlanta &
34 West Point Railroad Company, filed December 24th, 1913, together with certificate of court thereon.

(9) Motion for new trial filed June 9th, 1915, together with approval of the grounds thereof and the order of the court thereon and the acknowledgment of service by plaintiff's counsel thereon.

(10) Amended motion for new trial filed on the 30th day of August, 1915, together with order of court approving the grounds thereof and the acknowledgment of service thereon.

(11) The approved charge of the Court filed the 30th day of August, 1915, together with approval of the Court thereon.

(12) The brief of evidence filed August 30th, 1915, together with approval of the court thereon.

(13) The order of the Court overruling the motion for new trial and denying new trial, of date September 1st, 1915.

(14) Verdict of the jury of date June 8, 1915, and judgment thereon of date June 8, 1915.

And now, within the time provided by law and within thirty days of the entry of the order and judgment overruling said motion for new trial as amended, come the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, as Lessees of the Georgia Railroad & Banking Company, and Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company,

and tender this their bill of exceptions and pray that the same may be signed and certified as provided by law, in order that the errors
35 complained of may be considered and corrected by the Supreme Court of Georgia.

This September 3rd, 1915.

TYE, PEEPLES AND JORDAN,
Att'ys for Louisville & Nashville R. R. Co.
DORSEY, BREWSTER, HOWELL AND HEYMAN,
Att'ys for Atlanta & West Point R. R. Co.
McDANIEL AND BLACK,
Att'ys for Louisville & Nashville R. R. Co. and Atlantic Coast Line R. R. Co., Lessees.

P. O. Address: Atlanta, Ga.

36 I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This September 3rd, 1915.

W. D. ELLIS,
Judge Superior Court, Atlanta Circuit.

Due and legal service of the within and foregoing bill of exceptions and certificate acknowledged; copy received, and all further service waived.

This September 3rd, 1915.

MARION SMITH,
Attorney for O. Y. Layton, Plaintiff.

37 (Endorsed:) No. 29692. Fulton Superior Court. O. Y. Layton vs. Louisville & Nashville R. R. Co. et al. Bill of Exceptions. Filed in Office Sept. 3, 1915. Arnold Broyles, Clerk.

38 GEORGIA,
Fulton County:

I hereby certify, That the foregoing Bill of Exceptions, hereunto attached, is the true original Bill of Exceptions in the case stated, to-wit: Louisville & Nashville Railroad Co. et al., Plaintiff- in Error, vs. O. Y. Layton, Defendant in Error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of Court affixed this the 11 day of September, 1915.

[SEAL.] ARNOLD BROYLES, *Clerk.*

39 (Endorsed:) Supreme Court, Atlanta Circuit, October Term, 1915. Case No. 65. L. & N. R. R. Co., et al., Pl'ffs in error, vs. O. Y. Layton, Def't in error. Bill of Exceptions. Filed in office Sept. 3rd, 1915. Arnold Broyles, Clerk. Filed in office Sept. 14, 1915. W. E. Talley, D. Clerk.

40 LOUISVILLE & NASHVILLE R. R. Co. et al., Plaintiffs in Error,
vs.
O. Y. LAYTON, Defendant in Error.

41 (*Petition.*)

No. 29692.

Fulton Superior Court, Nov. Term, 1913.

O. Y. LAYTON
vs.
A. C. L. R. R. Co., Lessee, et al.

GEORGIA,
Fulton County:

To the Superior Court of Said County:

The petition of O. Y. Layton, respectfully shows:

1. The defendants herein are the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company, lessees of the railroad lines of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company and the Louisville and Nashville Railroad Company. Each of said companies is engaged in the operating of railroad lines into and through said County, and jointly maintain and operate joint freight terminals and joint freight depot in the City of Atlanta in said State and County under the name of the Atlanta Joint Terminals, an unincorporated joint association.

2. The said companies have damaged your petitioner in the sum of $30,000.00 by reason of the following facts:

3. On or about the 27th day of August, 1913, your petitioner was employed by the said defendants as a switchman switching cars in the yards of the freight terminals aforesaid in Fulton County, Georgia.

42 4. On or about said date your petitioner in the performance of his duties went upon a cut of cars to release the brakes thereon so that an engine of the defendants might couple thereto and remove the same.

5. Your petitioner in the course of the performance of his duties released all of said brakes except one, and while upon said cars the said engine of the defendants approached the same to couple thereto, and struck said cars a violent unusual and unnecessary blow.

6. The said engine failed to couple to said cars by impact, and

because of failure to so couple, and because of the violence with which it struck said cars, said cars were knocked violently down the track and against other cars standing on said track striking said cars with great force, because of which your petitioner was knocked from said cars receiving the injuries hereinafter stated.

7. The defendants herein are common carriers by rail, and are carriers of Interstate Commerce.

8. The defendants were negligent in that said cars and engine were not equipped with automatic couplers, which would couple with each other by impact.

9. The defendants were negligent in that said engine struck said cars a violent, unusual and unnecessary blow when it attempted to couple thereto.

10. Your petitioner shows that the switching engine which struck said cars such a violent, unusual and unnecessary blow was
43 not equipped with a power driving wheel brake.

11. Each and all of said negligence contributed to and caused your petitioner's injuries.

12. Because of being knocked from said cars your petitioner's right arm fell under said cars and was cut off just below the elbow. The muscles and nerves of your petitioner's back were severely wrenched and torn and spinal concussion has resulted therefrom.

13. Because of being injured, as above alleged, your petitioner was confined to a bed for six weeks. He is unable to walk any distance, and does not sleep soundly.

14. Your petitioner is maimed and disfigured for life.

15. Your petitioner has suffered, and will always suffer great pain because of said injuries.

16. Your petitioner alleges that his injuries are permanent, and his capacity to labor and earn a living has been entirely destroyed.

17. Your petitioner was thirty four years of age and was earning one hundred dollars per month. Your petitioner, however, alleges that he was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month.

Second Count.

And for further cause of action your petitioner shows:

18. The defendants herein are the Atlantic Coast Line
44 Railroad Company and the Louisville & Nashville Railroad Company, lessees of the railroad lines of the Georgia Railroad & Banking Company and the Atlanta & West Point Railroad Company and the Louisville and Nashville Railroad Company. Each of said companies is engaged in the operating of railroad lines into and through said County and jointly maintain and operate joint freight terminals and a joint freight depot in the City of Atlanta in said State and County under the name of the Atlanta Joint Terminals, an unincorporated joint association.

19. The said companies have damaged your petitioner in the sum of $30,000.00 by reason of the following facts:

20. On or about the 27th day of August, 1913, your petitioner was employed by the said defendants as a switchman switching cars in the yards of the freight terminals aforesaid in Fulton County, Georgia.

21. On or about the said date your petitioner in the performance of his duties went upon a cut of cars to release the brakes thereon so that an engine of the defendants might couple thereto and remove the same.

22. Your petitioner in the course of the performance of his duties released all of said brakes except one, and while upon said cars the said engine of the defendants approached the same to couple thereto, and struck said cars a violent, unusual and unnecessary blow.

23. The said engine failed to couple to said cars by im-
45 pact, and because of failure to so couple, and because of the violence with which it struck said cars, said cars were knocked violently down the track and against other cars standing on said track striking said cars with great force, because of which your petitioner was knocked from said cars receiving the injuries hereinafter stated.

24. The defendants are common carriers by rail and are carriers of Interstate Commerce. At the time of your petitioner's injuries, the defendants were engaged in Interstate Commerce, and your petitioner was employed and was engaged in the transportation in Interstate Commerce.

25. The defendants were negligent in that said engine and cars were not equipped with automatic couplers which would couple with each other by impact.

26. The defendants were negligent in that said engine struck said cars a violent, unusual and unnecessary blow when it attempted to couple thereto.

27. Your petitioner shows that the switching engine which struck said cars such a violent, unusual and unnecessary blow was not equipped with a power driving wheel brake.

28. Each and all of said negligence contributed to and caused your petitioner's injuries.

29. Because of being knocked from said cars your petitioner's right arm fell under said cars and was cut off just below the
46 elbow. The muscles and nerves of your petitioner's back were severely wrenched and torn and spinal concussion has resulted therefrom.

30. Because of being injured, as above alleged, your petitioner was confined to a bed for six weeks. He is unable to walk any distance, and does not sleep soundly.

31. Your petitioner is maimed and disfigured for life.

32. Your petitioner has suffered, and will always suffer great pain because of said injuries.

33. Your petitioner alleges that his injuries are permanent, and his capacity to labor and earn a living has been entirely destroyed.

34. Your petitioner was thirty four years of age and was earning one hundred dollars per month. Your petitioner, however, alleges

that he was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month.

Wherefore, your petitioner prays that process do issue requiring the defendants to be and appear at the next term of this Honorable court to answer your petitioner's complaint.

SMITH AND HASTINGS,
Petitioner's Att'ys.

Filed in office this the 14th day of Oct., 1913. W. W. Clarke, D. Clk.

47 STATE OF GEORGIA,
County of Fulton:

O. Y. LAYTON
vs.
ATLANTIC COAST LINE RAILROAD COMPANY and LOUISVILLE & Nashville Railroad Company, Lessees of Georgia Railroad and Banking Company, and Atlanta & West Point Railroad Company and Louisville and Nashville Railroad Company.

To the Sheriff or His Deputy of Said County, Greeting:

The defendants are hereby required, personally or by attorney to be and appear at the Superior Court, to be held in and for said *said* County on the first Monday in November 1913, then and there to answer the Plaintiff's complaint, as in default thereof said court will proceed as to justice shall appertain.

Witness: The Honorable J. T. Pendleton, Judge of said Court, this 14th day of Oct., 1913.

W. W. CLARKE, *D. Cl'k.*

GEORGIA,
Fulton County:

I have this day served the defendants, the Atlantic Coast Line Railroad Company, a corporation, and the Louisville & Nashville Railroad Company, a corporation lessees of the railroad lines of the Georgia Railroad & Banking Company, by serving George I. Walker, their agent, personally with a copy of the within petition and
48 process at the office and place of doing business of said corporation in Fulton County, Georgia.

This the 17th day of Oct., 1913.

J. W. CHAMBERS, *D. Sh'ff.*

GEORGIA,
Fulton County:

I have this day served the defendant, the Louisville & Nashville Railroad Company, a corporation, by serving Geo. I. Walker its agents, personally with a copy of the within petition and process at the office and place of doing business of said corporation in Fulton County, Georgia.

This the 17th day of Oct., 1913.

J. W. CHAMBERS, *D. Sh'ff.*

GEORGIA,
Fulton County:

I have this day served the defendant, the Atlanta & West Point Railroad Company, a corporation by serving C. A. Wickersham, its President by leaving a copy with Moultrie Hitt, his Chief Clerk personally with a copy of the within petition and process at the office and place of doing business of said corporation in Fulton County, Georgia.

This the 16th day of October, 1913.

J. W. CHAMBERS, *D. Sh'ff.*

49 Fulton Superior Court.

No. 29692.

O. Y. LAYTON
vs.
ATLANTIC COAST LINE RAILROAD CO. and LOUISVILLE & NASHVILLE Railroad Co., Lessees of Georgia Railroad & Banking Co., et al.

Now comes the Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, as Lessees of the Georgia Railroad & Banking Company, made defendants in the above styled cause, and Atlanta & West Point Railroad Company and demur generally and specially to plaintiff's petition upon the following grounds:

1. Because no cause of action is set out in said petition.

2. These defendants demur to the first count of the petition upon the ground that no cause of action is set out therein.

3. These defendants demur to the second count of plaintiff's petition upon the ground that no cause of action is set out therein.

4. These defendants demur to plaintiff's declaration upon the ground that the same contains a misjoinder of causes of action, the first count having declared upon a cause of action arising under the statutes of the State of Georgia or the common law, and the second count having declared upon a cause of action which arises under an Act of the Congress of the United States. Said two counts are inconsistent, incompatible and repugnant to each other and cannot co-exist in the same action.

5. These defendants demur to plaintiff's declaration upon the ground that the same is duplicitous,, the said declaration
50 consisting of two inconsistent counts, one based upon the State statute or the common law and the other based upon an Act of the Congress of the United States. The said two causes of action being inconsistent with each other in as much as that based upon the Act of Congress supersedes and displaces all other causes of action, said declaration is bad as being doubtful and equivocable.

6. These defendants demur to the first count of the plaintiff's petition upon the ground that there are allegations on the face of

the declaration to the effect that both the plaintiff and the defendants were engaged in interstate commerce at the time of his injuries, which allegations render plaintiff's action maintainable only under the Act of Congress, and the cause of action set up under said Act of Congress displaces and supersedes the cause of action set up in the first paragraph of the petition based upon the statute of Georgia or the common law.

7. These defendants specially demur to the allegation contained in paragraph 3 as to the date of the plaintiff's injury upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

8. These defendants demur to paragraph 4 upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

51 9. These defendants specially demur to the allegation in paragraph 10 that the switching engine therein referred to was not equipped with a power driving wheel, such allegation being irrelevant, it not appearing by proper statement of fact in such paragraph or elsewhere in said declaration what bearing the absence of a power driving wheel brake may have had upon plaintiff's alleged injury.

10. These defendants demur to the following allegation in paragraph 17 of the petition: "Your petitioner, however, alleges that he was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month." The allegation herein quoted is demurred to upon the ground that the same does not furnish a proper measure for the assessment of damages and because the allegation in question is a conclusion, no facts or details being given upon which the same is based.

11. These defendants specially demur to the allegations contained in paragraph 20 as to the date of the plaintiff's injury upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

12. These defendants demur to paragraph 4 upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

13. The following allegation in paragraph 24 is demurred to: "At the time of your petitioner's injuries the defendant was
52 engaged in interstate commerce and your petitioner was employed and engaged in the transportation of interstate commerce." The allegation above quoted is a conclusion of law and not a statement of fact by the pleader. No facts are stated upon which such conclusion is based.

14. These defendants specially demur to the allegation in paragraph 27 that the switching engine therein referred to was not equipped with a power driving wheel, such allegation being irrelevant, it not appearing by proper statement of fact in such paragraph or elsewhere in said declaration what bearing the absence of a power driving wheel brake may have had upon plaintiff's alleged injury.

15. These defendants demur to the following allegation in paragraph 34 of the petition: "Your petitioner, however, alleges that he

was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month." The allegation herein quoted is demurrer to upon the ground that the same does not furnish a proper measure for the assessment of damages and because the allegation in question is a conclusion, no facts or details being given upon which the same is based.

Wherefore, these defendants pray that each and all the grounds, general and special, of this their demurrer be sustained and that plaintiff's action be dismissed.

53 McDANIEL AND BLACK,
DORSEY, BREWSTER, HOWELL AND HEYMAN,
CHAS. R. CLARKE, JR.,
Atty's for Def'ts A. C. L. R. R. Co. and L. & N. R. R. Co., Lessees of G. R. & Banking Co. and A. & W. P. R. R. Co.

Filed in office this the 3rd day of Nov. 1913. W. W. Clarke, D. Cl'k.

54 (*Demurrer of L. & N. R. R. Co.*)

GEORGIA,
Fulton County:

Now comes the Louisville and Nashville Railroad Company one of the defendants in the above stated cause, and demurs to the petition of plaintiff in said cause upon the following grounds:

1. Because no cause of action is set out in said petition.

2. This defendant demur to the first count of the petition upon the ground that no cause of action is set out therein.

3. This defendant demur to the second count of plaintiff's petition upon the ground that no cause of action is set out therein.

4. This defendant demur to plaintiff's declaration upon the ground that the same contains a misjoinder of causes of action, the first count having declared upon a cause of action arising under the statutes of the State of Georgia or the common law, and the second count having declared upon a cause of action which arises under an Act of the Congress of the United States.

Said two counts are inconsistent, incompatible and repugnant to each other and cannot coexist in the same action.

5. This defendant demur to plaintiff's declaration upon the ground that the same is duplicitous, the said declaration consisting of two inconsistent counts, one based upon the State statute or the
55 common law and the other based upon an Act of the Congress of the United States. The said two causes of action being inconsistent with each other inasmuch as that based upon the Act of Congress supersedes and displaces all other causes of action, said declaration is bade as being doubtful and equivoca*ble*.

6. This defendant demur to the first count of the plaintiff's petition upon the ground that there are allegations on the face of the

declaration to the effect that both the plaintiff and the defendants were engaged in interstate commerce at the time of his injuries, which allegations render plaintiff's action maintainable only under the Act of Congress, and the cause of action set up under said Act of Congress displaces and supersedes the cause of action set up in the first paragraph of the petition based upon the statute of Georgia or the common law.

7. This defendant specially demur to the allegation contained in paragraph 3 as to the date of the plaintiff's injury upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

8. This defendant demur to paragraph 4 upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

9. This defendant specially demur to the allegation in paragraph 10 that the switching engine therein referred to was not equipped with a power driving wheel, brake such allegation being irrelevant, it not appearing by proper statement of fact in such para-
56 graph or elsewhere in said declaration what bearing the absence of a power driving wheel brake may have had upon plaintiff's alleged injury.

10. This defendant demur to the following allegation in paragraph 17 of the petition, "Your petitioner, however, alleges that he was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month." The allegation herein quoted is demurred to upon the ground that the same does not furnish a proper measure for the assessment of damages and because the allegation in question is a conclusion, no facts or details being given upon which the same is based.

11. This defendant specially demur to the allegations contained in paragraph 20 as to the date of the plaintiff's injury upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

12. This defendant demurs to paragraph 21 upon the ground that the same is uncertain and vague and not sufficiently definite and specific.

13. The following allegation in paragraph 24 is demurred to: "At the time of your petitioner's injuries the defendant was engaged in interstate commerce and your petitioner was employed and engaged in the transportation of interstate commerce." The allegation above quoted is a conclusion of law and not a statement of
57 fact by the pleader. No facts are stated upon which such conclusion is based.

14. This defendant specially demurs to the allegation in paragraph 27 that the switching engine therein referred to was not equipped with a power driving wheel brake, such allegation being irrelevant, it not appearing by proper statement of fact in such paragraph or elsewhere in said declaration what bearing the absence of a power driving wheel brake may have had upon plaintiff's alleged injury.

15. This defendant demurs to the following allegation in para-

graph 34 of the petition. "Your petitioner, however, alleges that he was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month." The allegation herein quoted is demurred to upon the ground that the same does not furnish a proper measure for the assessment of damages and because the allegation in question is a conclusion, no facts or details being given upon which the same is based.

Wherefore, this defendant prays that each and all of the grounds general and special, of this its demurrer be sustained and that plaintiff's petition be dismissed.

TYE, PEEPLES AND JORDAN,
Def't's Att'ys.

Filed in office this the 12th day of Nov., 1913. W. W. Clarke, D. Cl'k.

58 (*Answer of A. C. L. R. R. Co. et al.*)

GEORGIA,
Fulton County:

Now comes the Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, as Lessees of the Georgia Railroad and Banking — made defendant in the above styled case and Atlanta & West Point Railroad Co., and, without waiving their demurrer filed therein, but relying and insisting upon the *said* same and subject thereto, make answer to the plaintiff's petition as follows:

1. Paragraph 1 of the petition is admitted.
2. Paragraph 2 of the petition is denied.
3. Paragraph 3 of the petition is admitted.
4. Answering paragraph 4 of the petition, these defendants admit that on or about the date mentioned in paragraph 3 the plaintiff, in the performance of his duties went upon a cut of cars. They deny, however, that it was his duty to release all the brakes on said cars so that the engine of the defendants might couple thereto and remove the same.
5. Answering paragraph 5, these defendants from insufficient information, can neither admit nor deny the first allegation in said paragraph as follows: "Your petitioner in the course of the performance of his duties released all of said brakes except one." These defendants deny the balance of said paragraph 5.

59 6. Answering paragraph 6, these defendants deny the allegations therein contained. These defendants qualify their general denial of the allegations contained in said paragraph in the following manner, They deny that the petitioner was knocked from certain cars in the manner and as the result of the causes alleged. They admit that he fell from certain cars as the result of his own negligence and that he sustained certain injuries in consequence of his said fall. They expressly deny that the said injuries were caused in the manner alleged in said paragraph 6 and elsewhere in said petition.

7. Answering paragraph 7, these defendants admit that the defendants joined in this action are common carriers by rail and are carriers in interstate commerce, though they further aver that all of said defendants are also carriers engaged in intrastate commerce.

8. Paragraph 8 of the petition is denied.

9. Paragraph 9 of the petition is denied.

10. Paragraph 10 of the petition is denied.

11. Paragraph 11 of the petition is denied.

12. Answering paragraph 12, these defendants admit that the plaintiff has suffered the loss of his right arm but they deny the inference contained in the allegation with respect thereto in paragraph 12 to the effect that he lost his arm in being knocked from cars in the manner previously described in the petition. The further allegations of paragraph 12 are denied.

13. Answering paragraph 13, these defendants from in-
60 sufficient information, can neither admit nor deny that the petitioner was confined to his bed for six months. They deny the other allegations in the said paragraph.

14. Answering paragraph 14, these defendants admit that the plaintiff has lost one of his arms and to that extent is maimed and disfigured for life.

15. These defendants deny paragraph 15.

16. Answering paragraph 16, these defendants admit that in losing his arm petitioner has suffered a permanent injury. They deny, however, that his capacity to labor and earn a living has been entirely destroyed.

17. Answering paragraph 17, these defendants, from insufficient information can neither admit nor deny the allegations therein contained as to the plaintiff's age. They, however, deny all the further allegations in paragraph 17 with respect to the amount that plaintiff was earning at the time of the injury and with respect to his earning capacity.

18. These defendants admit paragraph 18.

19. Paragraph 19 is denied.

20. Paragraph 20 is denied.

21. Answering paragraph 21 of the petition, these defendants admit that on or about the date mentioned in paragraph 3 the plaintiff, in the performance of his duties, went upon a cut of cars. They deny, however, that it was his duty to release all the
61 brakes on said cars so that the engine of the defendants might couple thereto and remove the same.

22. Answering paragraph 22, these defendants, from insufficient information, can neither admit nor deny the first allegation in said paragraph as follows: "Your petitioner in the course of the performance of his duties released all of said brakes except one." These defendants deny the balance of said paragraph 22.

23. Answering paragraph 23, these defendants deny the allegations therein contained. These defendants qualify their general denial of the allegations contained in said paragraph in the following manner, They deny that the petitioner was knocked from certain cars in the manner and as the result of the causes alleged.

They admit that he fell from certain cars as the result of his own negligence and that he sustained certain injuries in consequence of his said fall. They expressly deny that the said injuries were caused in the manner alleged in said paragraph 23 and elsewhere in said petition.

24. Answering paragraph 24, these defendants admit that they and their co-defendants are common carriers by rail and are engaged in interstate commerce. They expressly aver, however, that all of the defendants joined in the action are also carriers of interstate commerce. Answering the following averment in paragraph 24; "At the time of your petitioner's injuries the defendants were engaged in interstate commerce and your petitioner was em-
62 ployed and engaged in the transportation of interstate commerce," these defendants respectfully aver that such allegation is a conclusion of law, that no facts have been set up in paragraph 24 of elsewhere in the petition upon which the conclusion in question is based. These defendants say that the averment quoted not being an allegation of fact raises a question of law, and that from insufficient information they can neither admit nor deny the said allegation.

25. Paragraph 25 is denied.

26. Paragraph 26 is denied.

27. Paragraph 27 is denied.

28. Paragraph 28 is denied.

29. Answering paragraph 29, these defendants admit that the plaintiff has suffered the loss of his right arm, but they deny the inference contained in the allegation with respect thereto in paragraph 29 to the effect that he lost his arm in being knocked from cars in the manner previously described in the petition. The further allegations of paragraph 29 are denied.

30. Answering paragraph 30, these defendants, from insufficient information, can neither admit nor deny that the petitioner was confined to his bed for six months. They deny the other allegations in the said paragraph.

31. Answering paragraph 31, these defendants admit that the plaintiff has lost one of his arms and to that extent is maimed and disfigured for life.

63 32. These defendants deny paragraph 32.

33. Answering paragraph 33, these defendants admit that in losing his arm petitioner has suffered a permanent injury. They deny, however, that his capacity to labor and earn a living has been entirely destroyed.

34. Answering paragraph 34, these defendants, from insufficient information, can neither admit nor deny the allegations therein contained as to the plaintiff's age. They, however, deny all the further allegations in paragraph 34 with respect to the amount that plaintiff was earning at the time of the injury and with respect to his earning capacity.

And of this they put themselves upon the country.

McDANIEL & BLACK,
DORSEY, BREWSTER, HOWELL AND HEYMAN,
CHAS. R. CLARKE, Jr.,
Att'ys for Def'ts.

Filed in office 3rd day of Nov., 1913. W. W. Clarke, D. Cl'k.

64 (*Answer of L. & N. R. R. Co.*)

Georgia,
Fulton County:

Now comes the Louisville & Nashville Railroad Company, one of the defendants in the above stated cause, and without waiving its demurrer filed therein, for answer to the petition of plaintiff says:

Answer *of* the First Count.

1. It admits the allegations of paragraphs 1 and 3 of the petition.
2. It denies the allegations of Paragraph 2 of the petition.
3. It admits that on or about the date mentioned in paragraph 3 plaintiff in the performance of his duties, went upon a cut of cars. It denies that it was plaintiff's duty to release all the brakes on said cars so that the engine of defendants might couple thereto and remove same.
4. For lack of sufficient information it can neither admit nor deny any of the allegations of paragraph 5 as to what petitioner did. It denies the remaining allegations of paragraph 5.
5. It denies the allegations of paragraph 6 as made.
6. It admits the allegations of paragraph 7 of the petition.
7. It denies the allegations of paragraphs 8, 9, 10 and 11 of the petition.
8. For lack of sufficient information it neither admits nor denies the allegations of paragraphs 12, 13, 14, 15 and 17 of the
65 petition.
9. It denies the allegations of paragraph 16.

Answer to the Second Count.

1. It admits the allegations of paragraph 18 of the petition.
2. It denies the allegations of paragraphs 19 and 20 of the petition.
3. Answering paragraph 21 of the petition it admits that about the date mentioned in paragraph 20, plaintiff in the performance of his duties went upon a cut of cars. It denies that it was plaintiff's duty to release all the brakes on the cars so that defendants' engine might couple thereto and remove same.
4. For lack of sufficient information defendant can neither admit

nor deny the allegations of paragraph 22 as to what was done by petitioner. It denies the remainder of said paragraph.

5. It denies the allegations of paragraph 23 as made.

6. It admits the allegations of paragraph 24, except the allegation that at the time of petitioner's injuries defendants were engaged in interstate commerce and petitioner was employed and engaged in the transportation of interstate commerce, which allegations it avers are conclusions of law, no facts being stated in the paragraph or elsewhere in the petition, upon which said conclusion is based and therefore defendant for lack of sufficient information can neither admit nor deny said allegations.

7. It denies paragraphs 25, 26, 27 and 28 and 33.

66 8. For lack of sufficient information it can neither admit nor deny paragraphs 29, 30, 31, 32, and 34.

And having fully answered it prays to be hence discharged.

TYE, PEEPLES AND JORDAN,
Att'ys for Def't.

Filed in office this the 12th day of Nov., 1913. W. W. Clarke, D. Cl'k.

67 (*Order on Demurrer.*)

This demurrer having been heard, it is ordered by the Cour that paragraphs 1, 2, 3, 4, 5, 6 of this demurrer be and the same are hereby overruled and that paragraphs 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the demurrer be and the same are hereby sustained with leave to the plaintiff to amend in twenty days from this date.

This Dec., 10th, 1913.

J. T. PENDLETON,
Judge S. C. A. C.

(*Order on Demurrer of L. & N. R. R. Co.*)

The within demurrer coming on to be heard. It is ordered that paragraphs 1, 2, 3, 4, 5, & 6 of the demurrer be and the same are hereby overruled and the remaining paragraphs of the demurrer are sustained with leave to plaintiff to amend his petition within 20 days from this date.

This Dec. 10, 1913.

J. T. PENDLETON,
Judge S. C. A. C.

68 (*Exceptions Pendente Lite, L. & N. R. R. Co.*)

GEORGIA,
Fulton County:

Be it remembered that on the 10th day of December, 1913, at the November Term, 1913, of the Superior Court of Fulton County, there came on to be heard in the Superior Court of said County, before

Hon. John T. Pendleton, Judge of the said Court presiding, the cause of O. Y. Layton, vs. Atlantic Coast Line Railroad Company, and the Louisville and Nashville Railroad Company lessees of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company, and the Louisville & Nashville Railroad Company, said hearing was had upon the separate demurrer of the Louisville & Nashville Railroad Company to the petition of plaintiff in said cause.

After argument upon said demurrer on the said day an order was passed by the Court overruling paragraphs 1, 2, 3, 4, 5, and 6 of the demurrer, and sustaining the remaining paragraphs of the demurrer, with leave to the plaintiff to amend his petition.

To that portion of the order of the Court overruling paragraphs 1, 2, 3, 4, 5, and 6 of the demurrer the Louisville and Nashville Railroad Company excepted and now excepts, and assigns the same as error.

And for more specific assignment of error it says that each and all of said grounds of demurrer which were overruled, as above stated,
should have been sustained, because each and all of them
69 were sufficient in law.

And now, at the term at which said judgment complained of was made, and within thirty days of the date of making of the same, comes the said Louisville and Nashville Railroad Company and tenders this, its bill of exceptions, pendente lite and prays that the same may be signed and certified, that the errors alleged to have been committed may be considered and corrected.

TYE, PEEPLES AND JORDAN,
Att'ys for Def't L. & N. R. R. Co.

I, hereby certify that the above and foregoing bill of exceptions pendente lite is true and the Clerk of the Superior Court of Fulton County, Georgia, is hereby ordered to enter said bill of exceptions and this certificate upon the minutes of said Court, as provided by law.

This Dec. —, 1913.

J. T. PENDLETON,
Judge S. C. A. C.

Filed in office this the 16th day of Dec., 1913.

70 (*Amended Petition.*)

GEORGIA,
Fulton County:

Now comes the plaintiff and amends his petition as follows:

1. Plaintiff strikes from paragraph 3 the words "or about" between the word "on" and the words "the 27th day of August."

2. Plaintiff strikes from paragraph 4 the words "or about" between the word "on" and the words "said date."

3. Plaintiff strikes from paragraph 17 the second sentence in said paragraph.

4. Plaintiff adds to the first count the following allegation, to-wit: Your petitioner shows that an engine equipped with a power driving wheel brake can be stopped and handled more readily than one not so equipped, and your petitioner shows that the absence of said power driving wheel brake was one of the contributing causes causing said engine to strike said cars, as alleged in said petition. Your petitioner alleges this as one of the contributing causes, and renews his allegation that the negligence of the defendant, as set out in his original petition, in operating said engine violently against said car contributed to and caused your petitioner's injuries.

5. Plaintiff strikes from paragraph 20 the words "or about" between the word "on" and the words "the 27th day of August."

6. Plaintiff strikes from paragraph 21 the words "or about" between the word "on" and the words "said date."

71 7. Plaintiff adds to paragraph 24 the following, to-wit: The cut of cars with which your petitioners was working were loaded with freight which had been brought into this State in said cars from the State of Tennessee. Your petitioner was handling said cars, some of which were to be left in Atlanta so that the freight might be delivered to its consignees, and some of which were to be transported in trains going into Florida, North and South Carolina and Alabama. Your petitioner does not know the numbers or initials of said cars, and is, therefore, not able to give in more detail the exact routing of each. Your petitioner alleges that the exact routing is fully in the possession of the defendants.

8. Your petitioner strikes from paragraph 34 the second sentence thereof.

9. Your petitioner adds to the second count the following allegation, to-wit: Your petitioner shows that an engine equipped with a power driving wheel brake can be stopped and handled more readily than one not so equipped and your petitioner shows that the absence of said power driving wheel brake was one of the contributing causes causing said engine to strike said cars, as alleged in said petition. Your petitioner alleges this as one of the contributing causes, and renews his allegation that the negligence of the defendant, as set out in his original petition, in operating said engine violently against said car contributed to and caused your petitioner's injuries.

SMITH AND HASTINS,
Pl'ff's Att'ys.

72 The foregoing amendment allowed subject to demurrer. This the 20th day of Dec., 1913.

J. T. PENDLETON,
Judge S. C. A. C.

Filed in office this the 20th day of Dec., 1913. J. C. Lewis, D. Cl'k.

73 *(Exceptions Pendente Lite.)*

GEORGIA,
Fulton County:

Be it remembered, that on the 10th day of December, 1913, there came on to be heard before his Honor John T. Pendleton, in Fulton Superior Court, the demurrer of the defendants, the Atlantic Coast Line Railroad Co., and Louisville and Nashville Railroad Co., as lessees of Georgia, Railroad & Banking Company, and the Atlanta & West Point Railroad Company, to the plaintiff's declaration in the above stated case, and that after argument the Court entered an order overruling paragraphs Nos. one, two, three, four, five and six of said demurrer on each and every ground set out therein, to which ruling, judgment and order of the court the defendants then and there excepted, and now except and assign the same as error, and for specific assignment of error defendants say that said paragraphs and each of them should have been sustained upon each and every ground set out therein.

And now, within the time allowed by law, come the defendants and tender this their bill of exceptions pendente lite, and prays that the same may be certified as true by the Court and be ordered to be entered upon the minutes and made a part of the record in the above stated case.

74 McDANIEL AND BLACK,
DORSEY, BREWSTER, HOWELL AND HEYMAN,
Att'ys for Defendants A. C. L. R. R. Co. and L. & N. R. R. Co., Lessees of G. R. & B. Co., and A. & W. P. R. R. Co.

I do hereby certify that the foregoing bill of exceptions pendente lite is true. It is ordered that the same be entered upon the minutes and made a part of the record in the above stated case. This 24 day of Dec., 1913.

J. T. PENDLETON,
Judge S. C. A. C.

Filed in office this the 24th day of Dec., 1913. J. C. Lewis, D. Cl'k.

75 *(Verdict.)*

We, the Jury find on first count for plaintiff $13,900.00. 6/8/15.

J. C. FOLDS, *Foreman.*

(Judgment.)

Whereupon, it is considered, ordered and adjudged by the Court that the plaintiff do recover of the defendants the sum of Thirteen

thousand, nine hundred dollars ($13,900.00) and $—— costs of court.

This June 8th, 1915.

W. D. ELLIS,
Judge S. C. A. C.

MARION SMITH, *Pl'ff's Att'y.*

76 *(Motion for New Trial.)*

GEORGIA,
Fulton County:

The Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of the Georgia Railroad and Banking Company, the Louisville & Nashville Railroad Company and the Atlanta & West Point Railroad Company, the defendants, being dissatisfied with the verdict and judgment in this case, come now at the term at which the trial was had and before the adjournment thereof, and within thirty (30) days from such trial and within the time allowed by law, and move the court for a new trial upon the following grounds, to-wit:

1. Because the verdict is contrary to the evidence and evidence to support it.
2. Because the verdict is decidedly and strongly against the weight of the evidence.
3. Because the verdict is contrary to law.
4. Because the verdict is excessive in amount.

Wherefore movants Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company Lessees of the Georgia Railroad & Banking Company, Louisville and Nashville Railroad Company and the Atlanta & West Point Railroad Company pray that these their grounds for new trial be considered and inquired of by the Court and approved by the Court and that said verdict be set aside and a new trial ordered in this cause.

77 This June 9th 1915.

TYE, PEEPLES AND JORDAN,
Att'ys for L. & N. R. R. Co.

DORSEY, BEWSTER, HOWELL AND HEYMAN,
Att'ys for Atlanta & West Point Railroad Company.

McDANIEL AND BLACK,
Att'ys for L. & N. Railroad Co. and Atlantic Coast Line R. R. Company, Lessees of Ga. R. R. and Banking Company.

The foregoing motion for new trial read and considered. The grounds thereof are approved. It is ordered that the plaintiff O. Y. Layton, show cause before me on the 26th day of June, 1915 why the foregoing motion should not be granted and the verdict rendered set aside and a new trial ordered.

It is further ordered that this motion for new trial and the order thereon shall operate as a supersedeas and the judgment shall be stayed and executed- shall not be issued until the further order of the court, vacating such supersedeas and revoking said stay.

Let the said O. Y. Layton or his counsel, be served with a copy of this motion and order.

It is further ordered that the movants shall have until the actual hearing of this motion, whether heard at the date above set
78 or at a future date thereafter, either in Term time or vacation, in which to prepare, have approved and to file a brief of the evidence introduced upon the trial of this case.

Movants shall further have the right to amend their motion for new trial and by amendment to add further grounds thereto.

June 9, 1915.

W. D. ELLIS,
Judge S. C. A. C.

Due and legal service of the foregoing motion for new trial and order thereon acknowledged, and copies of motion and order received.

This June 9th, 1915.

MARION SMITH,
Att'ys for O. Y. Layton, Pl'ff.

Filed in office this the 9th day of June, 1915. W. W. Clarke, D. Cl'k.

79 Fulton Superior Court.

No. 29692.

O. Y. LAYTON
vs.
THE ATLANTIC COAST LINE RAILROAD COMPANY et al.

Amended Motion of Defendants for New Trial.

Now comes the Defendants, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, as Lessees of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company and the Louisville & Nashville Railroad Company, and amend their motion for new trial in this cause filed and aver that a new trial should be granted upon the following grounds:

1.

Because the verdict and judgment in this cause is excessive, and so excessive as to indicate undue bias and prejudice against the Defendants on the part of the jury.

2.

Because the Court erred in the following portion of its charge to the jury:

"The law makes it your duty, gentlemen, to reconcile conflicting evidence, so as to make all the witnesses in the case speak the truth, and perjury be imputed to none, so if there is a conflict in the case it would be your duty to reconcile it, if it can be done, so as to make it would be your duty to reconcile it, if it can be done, so as
80 to make all the witnesses speak the truth, and perjury be imputed to none."

Defendants aver that this charge of the Court was error because it did not contain an instruction to the jury as to their duty in the event they could not reconcile the conflicting evidence in the case. The Court should further have instructed the jury that in the event they could not reconcile the conflicting evidence so as to make all witnesses speak the truth, then they should believe that evidence which appeared most credible to them.

3.

Because the Court erred in the following portion of its charge to the jury:

"If you find under the evidence that the defendants were engaged in interstate commerce at the time and place of the alleged injuries and that the plaintiff was in the employ of the defendants as an employee in their interstate commerce, then you will find, if you find for the plaintiff, that he is entitled to recover under the second count."

Defendants aver that this charge of the Court was error because there was no evidence that either the plaintiff or the defendants were engaged in interstate commerce at the time of the plaintiff's injury, and there being no presumption of law or fact that either was so engaged, the burden was upon the plaintiff to prove that defendants were engaged in interstate commerce and that he was employed in interstate commerce at the time of his injury.
81 There being no evidence and no presumption of law or fact to sustain this, the Court erred in submitting to the jury the second count of the petition based on the Federal Employers' Liability Act.

4.

Because the Court erred in the following portion of its charge to the jury:

"If you find that the plaintiff is entitled to recover, but that the defendants were not engaged in interstate commerce, or that, if they were engaged in interstate commerce, the plaintiff was not in their employ in the business of interstate commerce, then you would pass to a consideration of the first count in the petition, which alleges

that the plaintiff was injured and the defendants are liable therefor, under the laws of this State."

Defendants aver that this charge of the Court was error because there was no evidence that the plaintiff was engaged in intrastate commerce at the time of the injury, nor that the plaintiff and the defendants were not at the time engaged in interstate commerce, and there being no presumption of law or fact as to which class of commerce the parties were engaged in at the time of the injury, the Court should not have allowed the plaintiff in the absence of such evidence and presumption to go to the jury upon the first count, based on the State law, and the Court erred in giving the instruction complained of in this ground and in making the submission to the jury embodied therein.

82 5.

Because the Court erred in the following portion of its charge to the jury:

"The law (Georgia State Law) under consideration provides further: 'that in any action brought against any common carrier under and by virtue of the provisions of the two preceding sections, to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury of such employees.' "

Defendants aver that this charge of the Court was error because the plaintiff was not injured while engaged in any task in connection with any safety appliance required by the statute enacted for the safety of employees of railroads, and not being so engaged, no actionable negligence could be predicated upon any violation of any such statute enacted for the safety of employees. This charge was not pertinent to any issue in the case upon which actionable negligence could be predicated by this plaintiff against these defendants.

Movants further contend and show that the only violation of any statute enacted for the safety of employees relied upon by the plaintiff as a ground for negligence, was the violation of Section 2 of the Act of Congress approved March 2nd, 1893, and amended April 1st, 1896, March 2nd, 1903, and April 14th, 1910, which Acts of
83 Congress comprise what are known as the Federal Safety Appliance Acts, which forbids the hauling or using by railroads and common carriers subject to such Acts any car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," and there was no evidence tending to show a violation of any statute enacted for the safety of employees save the provision of the Federal Safety Appliances laws with respect to automatic couplers; and Movants contend that the plaintiff at the time of his injury was not at a place and so engaged, according to the undisputed evidence, as would place him within the purview of the Federal Safety Appliance statutes or any portion thereof, so as to make any

failure of duty on the part of these defendants with respect to a compliance with such Federal Safety Appliance laws, and in the particular of complying with said laws with regard to automatic couplers, negligence relative to the plaintiff at the time of his injury and of which he could complain, and Movants contend that in giving the instruction complained of in this ground the Court misconstrued the Acts of Congress relating to automatic couplers and misapplied the provisions thereof.

6.

Because the Court erred in the following portion of its charge to the jury:

"The general rule of law is that a servant, that is to say, an employee, assumes the risk of his employment and is bound to
84 exercise his own skill and diligence to protect himself. That is the general rule, and in this case, and under this first count, if you believe this plaintiff was injured and that his injury was brought about by the negligence of the defendants, as alleged in his petition, and that such negligence was not due to any defect or insufficiency due to its negligence in its cars, engine, appliances or other equipment, then this general rule as to the assumption of risk by the plaintiff would apply."

Defendants aver that this charge of the Court was error, in that it involved the questions of assumption of risk and of negligence of the defendants. Defendants aver that the assumption of risk by an employee and the negligence of defendant railroad companies are entirely different matters and should not be involved and submitted to the jury jointly as was done in this charge. Defendants further aver that this charge limited the doctrine of assumption of risk of an employee to cases where he was injured by the negligence of the defendants to certain specified negligence, whereas defendants aver that the doctrine of assumption of risk is separate and apart from the question of the negligence of employers and involves only the contractual assumption of the risk incidental to his work by an employee.

7.

Because the Court erred in the following portion of its charge to the jury:

85 "If, however, he was injured by the negligence of any of the officers, agents, or employees of such carrier, in the operation of its engines, cars and machinery, and not on account of a failure to provide such, or defects in such, then the general rule would apply, and the plaintiff could not recover if he brought about his own injury by his own carelessness amounting to a failure to exercise ordinary care, or if, by the exercise of ordinary care he could hav avoided the consequences of defendant's negligence, if they were negligent."

Defendants aver that this charge of the Court limited the assump-

tion of risk by an employee to negligence of the defendants, and not to the usual and ordinary risks of his employment.

Defendants further aver that this charge confused the doctrine of assumption of risk and the doctrine of contributory negligence in such manner as that the jury could not determine from the charge when the doctrine of the assumption of risk would apply or when the contributory negligence of the plaintiff would apply. The confusion arising from this charge was such as to render the jury unable to determine from the charge in which event assumption of risk was applicable and in which event contributory negligence was applicable.

8.

Because the Court erred in the following portion of its charge to the jury:

86 "The fact that the employee may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, would not be a bar to recovery, but the damages would be diminished by the jury in proportion to the amount of negligence attributable to him. As before stated, no such employee who may be injured shall be held to be guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees caused or contributed to the injury of such employee."

Defendants aver that this charge was error in that this plaintiff was not injured by reason of any defect in any appliance, the presence of which was required by any statute enacted for the safety of employees, while engaged in any duties in connection with any such appliances, and no actionable negligence therefore could be predicated upon the absence of any such safety appliance or upon any defect in any such safety appliance.

Movants further contend and show that the only violation of any statute enacted for the safety of employees relied upon by the plaintiff as a ground of negligence, was the violation of Section 2 of the Act of Congress approved March 2nd, 1893, and amended April 1st, 1893, March 2nd, 1903, and April 14th, 1910, which Acts of Congress comprise what are known as the Federal Safety Appliance Acts, which forbids the hauling or using by railroads or common carriers subject to such Acts any car "not equipped with

87 couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," and there was no evidence tending to show a violation of any statute enacted for the safety of employees save the provision of the Federal Safety Appliance laws with respect to automatic couplers; and movants contend that the plaintiff at the time of his injury was not at a place and so engaged, according to the undisputed evidence, as would place him within the purview of the Federal Safety Appliance Statutes, or any portion thereof, so as to make any failure of duty on the part of these defendants with respect to a compliance with such Federal Safety Appliance Laws and in the particular of complying with said laws with regard to auto-

matic couplers, negligence relative to the plaintiff at the time of his injury and of which he could complain, and movants contend that in giving the instruction complained of in this ground the Court misconstrued the Acts of Congress relating to automatic couplers and misapplied the provisions thereof.

9.

Because the Court erred in the following portion of its charge to the jury:

"Under this first count, if you believe that the defendants were common carriers and that the plaintiff suffered injury while he was employed by them as such carriers, then for such injury resulting in whole or in part from the negligence of any of the officers,
88 agents or employees of such carriers in the operation of their engines, cars or machinery, but not by reason of any defects or insufficiency in such cars, engines or machinery, the plaintiff would be entitled to recover unless he brought about his injury by his own carelessness, amounting to a failure to exercise ordinary care, or if he, by the exercise of ordinary care, could have avoided the consequences of the defendants' negligence, if they were negligent."

Defendants aver that this charge of the Court was error, in that it did not incorporate an instruction that in this first count, before the plaintiff could recover, it would be incumbent upon him to show that he was engaged in intra-state commerce at the time of his injury and that the defendants were engaged in such commerce at the time of his injury.

10.

Because the Court erred in the following portion of its charge to the jury:

"I have already explained to you what the situation would be as to this contributory negligence and assumption of risk, if the plaintiff's injuries were produced by defects, or by a failure rather of the defendants to furnish appliances, safety appliances, required by law."

Defendants aver that this charge of the Court was error because the plaintiff was not injured while engaged in any task with
89 appliances for which a statute had been enacted for the safety of employees, and therefore no actionable negligence could be predicated in this case upon the absence of or defects in any such safety appliances.

Movants further contend and show that the only violation of any statute enacted for the safety of employees relied upon by the plaintiff as a ground of negligence, was the violation of Section 2 of the Act of Congress approved March 2nd, 1893, and amended April 1st, 1896, March 2nd, 1903, and April 14th, 1910, which Acts of Congress comprise what are known as the Federal Safety Appliance Acts, which forbids the hauling or using by railroads or common carriers subject to such Acts any car "not equipped with couplers coupling

automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," and there was no evidence tending to show a violation of any statute enacted for the safety of employees save the provision of the Federal Safety Appliance laws with respect to automatic couplers; and movants contend that the plaintiff at the time of his injury was not at a place and so engaged, according to the undisputed evidence, as would place him within the purview of the Federal Safety Appliance statutes, or any portion thereof, so as to make any failure of duty on the part of these defendants with respect to a compliance with such Federal Safety Appliance laws and in the particular of complying with said laws with regard to automatic couplers, negligence
90 relative to the plaintiff at the time of his injury and of which he could complain, and movants contend that in giving the instruction complained of in this ground the Court misconstrued the Acts of Congress relating to automatic couplers and misapplied the provisions thereof.

11.

Because the Court erred in the following portion of its charge to the jury:

"If you believe, under the evidence and under this count (this first count) that the defendants were negligent in the operation of their engines, cars and machinery, and not in respect to the appliances required by law, then the plaintiff would be entitled to recover, reducing his damages according to the proportion you believe negligence may be attributable to him; but, as before stated, if you believe that the plaintiff is entitled to recover, and that the defendants' negligence consisted in a failure to comply with any law enacted for the safety of employees, and that negligence caused or contributed to the injury, then the plaintiff would be entitled to recover without diminution of damages on account of contributory negligence, if any such existed."

Defendants aver that this charge of the Court was error because the plaintiff at the time of his injury was not engaged in any task in connection with any appliances required by any statute enacted for the safety of employees, and not being so engaged, no
91 actionable negligence can be predicated upon the absence of or any defect in any such safety appliance, and this being true, the Court should not have charged the jury relative to the defendants' alleged negligence consisting in a failure to comply with any law enacted for the safety of employees, nor that, if plaintiff's injury resulted from such negligence, then plaintiff would be entitled to recover without diminution of damages on account of contributory negligence.

Movants further contend and show that the only violation of any statute enacted for the safety of employees relied upon by the plaintiff as a ground of negligence, was the violation of Section 2 of the Act of Congress approved March 2nd, 1893, and amended April 1st, 1896, March 2nd, 1903, and April 14th, 1910,

which Acts of Congress comprise what are known as the Federal Safety Appliance Acts, which forbids the hauling or using by railroads and common carriers subject to such Acts any car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," and there was no evidence tending to show a violation of any statute enacted for the safety of employees save the provision of the Federal Safety Appliance laws with respect to automatic couplers; and movants contend that the plaintiff at the time of his injury was not at a place and so engaged, according to the undisputed evidence, as would place him within the purview
92 of the Federal Safety Appliance Statutes, or any portion thereof, so as to make any failure of duty on the part of these defendants with respect to a compliance with such Federal Safety Appliance laws, and in the particular of complying with said laws with regard to automatic couplers, negligence relative to the plaintiff at the time of his injury and of which he could complain, and movants contend that in giving the instruction complained of in this ground the Court misconstrued the Acts of Congress relating to automatic couplers and misapplied the provisions thereof.

Defendants aver that this charge of the Court was error further because:

(*a*) That in this charge the Court instructed the jury that in the event the defendants were negligent in the operation of their engines, cars and machinery, and not in respect to the appliances required by law, then the plaintiff would be entitled to recover, reducing his damages according to the proportion negligence may be attributable to him, and in this manner instructed the jury to find for the plaintiff if the defendants were negligent, without regard to the degree of negligence attributable to the plaintiff, whereas under this first count, based on the law of Georgia, plaintiff could not recover even if defendants were negligent in event plaintiff's negligence amounted to a lack of ordinary care on his part; and

(*b*) That in this charge the Court instructed the jury that if they believed the plaintiff is entitled to recover and that the
93 defendants' negligence consisted in a failure to comply with any law enacted for the safety of employees, and that negligence caused or contributed to the injury, then the plaintiff would be entitled to recover without diminution of damages on account of contributory negligence, and in this manner instructed the jury to find for the plaintiff if the defendants were negligent in this respect, without regard to the degree of negligence attributable to the plaintiff, whereas under this first count, based on the law of Georgia, plaintiff could not recover even if defendants were negligent in this respect, in event plaintiff's negligence amounted to a lack of ordinary care on his part; and

(*c*) That in this charge the Court failed to submit in connection therewith the defense of assumed risk urged by the defendants.

12. Because the Court erred in submitting to the jury the first count of plaintiff's petition, because said first count was based upon the law of Georgia, which is applicable only where both the employee and

the railway company are engaged at the time of the injury in intar-state commerce, and in this case there was no proof that plaintiff and defendant railway companies were so engaged at the time of his injury. The burden was upon the plaintiff to show this fact. In the absence of proof of such engagement in intrastate commerce at such time, the law of Georgia would not be applicable and this first
94 count based on that law should not have been submitted to the jury.

Wherefore, defendants pray that these their grounds of amended motion for new trial be approved by the Court and the verdict and judgment in this case be set aside and a new trial granted them.

DORSEY, BREWSTER, HOWELL AND HEYMAN,
TYE, PEEPLES AND JORDAN,
McDANIEL & BLACK,
Att'ys for Def'ts.

Due and legal service of the foregoing amended motion for new trial acknowledged and copy received, this 30 day of August, 1915.

MARION SMITH,
Attorneys for Pl'ff.

The grounds of the foregoing amended motion for new trial are approved as true and correct, and the amended motion is allowed and ordered filed as part of the record in this cause.

This August 30th, 1915.

W. D. ELLIS,
Judge S. C. A. C.

Filed in office this the 30th day of Aug., 1915. J. C. Lewis, D. Cl'k.

95 (*Judgment.*)

The motion for new trial in the above stated case and the amendment allowed to said motion coming on to be heard in due course, after argument and consideration, the Court is of the opinion that the case was fairly submitted to the jury. The numerous errors of law complained of may be meritorious, but, in the absence of rulings thereon by the Supreme Court, this Court would rule and charge as before, because I am not now convinced of error.

In reference to the amount of the verdict, the plaintiff, apparently in the vigor of life, lost his right arm, and is maimed for life. He must necessarily have suffered much, and his earning capacity has been largely destroyed. As to his other injuries, there was much and contradictory evidence. The examination of witnesses was lengthy and in addition thereto, the jury had the plaintiff *and* an admittedly well man stripped and examined before them.

I do not feel authorized, under all the evidence, to say that the verdict was so excessive as to warrant the court in setting it aside and granting a new trial on that ground.

It is therefore ordered that the motion for new trial as amended be overruled and a new trial is refused.

This Sept. 1st, 1915.

W. D. ELLIS,
Judge S. C. A. C.

96 Fulton Superior Court. Trial June 3d, 4th, 7th, and 8th, 1915.

Judge Ellis, Presiding.

No. 29692.

O. Y. LAYTON
vs.
ATLANTIC COAST LINE RAILROAD COMPANY et al.

Charge of the Court.

GENTLEMEN OF THE JURY: This is a suit brought by O. Y. Layton, who charges that the defendants in the case are the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, lessees of the railroad lines of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company, and the Louisville & Nashville Railroad Company; in which it is alleged that each of said companies is engaged in the operation of railroad lines into and through said county, and that they jointly maintain and operate joint freight terminals and a joint freight depot in the City of Atlanta, in said county, under the name of the Atlanta Joint Terminals, an unincorporated joint association.

In the second paragraph of the petition, it is alleged that said companies have damaged your petitioner in the sum of thirty thousand dollars, by reason of the following facts; and I am now stating to you the plaintiff's petition and contentions, as set out in the first count of his petition.

In the third paragraph, it is alleged that, on or about the 27th day of August, in the year 1913, the plaintiff alleges that
97 he was employed by the defendants as a switchman, switching cars in the yards of the freight terminals aforesaid, in Fulton County.

In the fourth paragraph of the first count, it is alleged that on or about said date, the plaintiff, in the performance of his duties, went upon a cut of cars and released the brakes thereon, so that an engine of the defendants might couple thereto and remove the same.

In the fifth paragraph of this first count, the plaintiff charges that, in the course of the performance of his duties, he released all of the brakes except one, and, while upon said cars, the said engine of the defendants approaching the same to couple thereto, and struck said cars a violent, unusual and unnecessary blow.

In the sixth paragraph of the first count, the plaintiff charges that said engine failed to couple to said cars by impact, and because of the failure to so couple, and because of the violence with which

it struck said cars, said cars were knocked violently down the track, and against other cars standing on said track, striking said cars with great force, because of which your petitioner was knocked from said cars, receiving the injuries hereinafter detailed.

In the seventh paragraph, the plaintiff charges that the defendants are common carriers by rail, and are carriers of interstate commerce.

In the eighth paragraph, it is charged that the defendants were negligent in that said cars and engine were not equipped with
98 automatic couplers which would couple with each other by impact.

In the ninth paragraph, the plaintiff charges that the defendants were negligent in that said engine struck said cars a violent, unusual and unnecessary blow when it attempted to couple thereto.

The tenth paragraph of this petition alleges that the switch engine which the plaintiff charges struck this violent, unusual and unnecessary blow, was not equipped with a power driving wheel brake; that act of negligence is not insisted on by the plaintiff, and therefore, in your deliberations in this case, you will not consider this charge, or anything in respect thereto, about a brake or want of brake on this driving wheel.

The eleventh paragraph charges that each and all of said negligence contributed to and caused the plaintiff's injuries.

The twelfth paragraph charges that, because of being knocked from said cars, the plaintiff's right arm fell under said cars, and was cut off just below the elbow, the muscles and nerves of petitioner's back were severely wrenched and torn, and spinal concussion, he charges, resulted therefrom.

The thirteenth paragraph charged that, because of being injured as above alleged, he was confined to his bed for six weeks, that he is unable to walk any distance, and does not sleep soundly.

The fourteenth paragraph of the first count charges that petitioner is maimed and disfigured for life.

99 The fifteenth paragraph charges that he has suffered, and will always suffer great pain because of said injuries.

The sixteenth paragraph alleges that his injuries are permanent, and his capacity to labor and earn a living has been entirely destroyed.

The plaintiff charges that he was thirty-four years of age at the time of this injury, and was earning one hundred dollars per month; he alleges that he was capable of earning a greater sum, and that his real earning capacity was about one hundred and fifty dollars per month; and therefore, he prays a verdict against the defendants on this count.

The second count alleges that the defendants are the same as alleged in the first count.

The nineteenth paragraph, or the second paragraph of this second count, charges that these companies have damaged him in the same sum of thirty thousand dollars, as charged in the first count.

The next paragraph in the second count charges that, on or about the 27th of August, 1913, he was employed by said defendants as a

switchman, switching cars in the yards of the freight terminals aforesaid in Fulton County, Georgia.

In the next paragraph of the second count, he charges that, on or about said date, the plaintiff, in the performance of his duties, went upon a cut of cars, and released the brakes thereon, so that an engine of the defendants might couple thereto and remove
100 the same.

The next paragraph in the second count charges that, in the course of the performance of his duties, he released all of the brakes except one, and while upon said cars, the said engine of the defendants approached the same to couple thereto, and struck said cars a violent, unusual and unnecessary blow.

The next paragraph charges that the engine failed to couple to said cars by impact, and because of the failure to so couple, and because of the violence with which it struck said cars, said cars were knocked violently down the track, and against other cars standing on the track, and struck the said cars with great force, because of which petitioner was knocked from said cars, receiving the injuries hereinafter stated.

The next paragraph of the second count charges that the defendants are common carriers by rail, and are carriers of interstate commerce; at the time of your petitioner's injuries, the defendants were engaged, the plaintiff says, in interstate commerce, and that he was employed and was engaged in the transportation of interstate commerce.

The allegations of negligence in the second count are practically the same as those charged in the first count, and the amount of his injuries, his age and his earning capacity, are all set forth in this second count just as they were set forth in the first count.

101 Subsequently to the filing of this original petition, the plaintiff amends his case by striking from the third paragraph the words "on or about," and inserting the word "on," so as to allege that the injury occurred on the 27th day of August. So another amendment is made, changing the words "on or about," and inserting the word "on," so as to refer to this date in making the charge that it occurred on the 27th of August.

The plaintiff amends paragraph 17 by striking the second sentence from said paragraph.

The plaintiff adds to the first count the following allegation, to wit: "Your petitioner shows that an engine equipped with a power driving wheel brake can be stopped and handled more rapidly than one not so equipped." That is not insisted on now, is it, Mr. Smith?

Mr. Smith: No sir; that goes out with the other.

That goes out. I have already explained to you, Gentlemen, that the plaintiff is not insisting that a failure to equip this engine with this power brake wheel, he is not insisting that that was any act of negligence, and you will not consider that.

Another amendment is made, striking the words "or about," so as to make the allegation that this injury occurred on the 27th day of August, instead of on or about.

The plaintiff amends by adding to Paragraph 24 the following,

to wit: "A cut of cars on which your petitioner was working was loaded with freight which had been brought into this State
102 in said cars from the State of Tennessee. Your petitioner was handling said cars, some of which were to be left in Atlanta, so that the freight might be delivered to its consignees, and some of which were to be transported in trains going to Florida, North and South Carolina. Your petitioner does not know the numbers and initials of said cars, and is therefore not able to give in more detail the exact routing of each. Petitioner alleges that the exact routing is fully in possession of defendants."

That is an amendment to the second count, which charges that these defendants were engaged in interstate commerce, and that the plaintiff was employed by them in interstate commerce.

The petitioner adds to the second count the following allegation, to wit: "Your petitioner shows"—that is not insisted on; that is about this power brake on the engine.

This original petition, Gentlemen, and the amendments thereto, constitutes the plaintiff's statement in writing of his cause of complaint; it states how he was injured, and states the extent of his injuries, and states the grounds of negligence, as he alleges; and you will have this petition and the amendments out with you, and you will read them, and see with more particularity than the Court has given you, exactly what is alleged and charged and claimed by the plaintiff.

The defendants in this case have filed answers. The Atlantic Coast Line Railroad Company and the Louisville & Nashville
103 Railroad Company, as lessees of the Georgia Railroad & Banking Company, made defendants in this case, and the Atlanta & West Point Railroad Company, answer as follows:

Paragraph first of the petition is admitted.

Paragraph second of the petition is denied; that is the allegation that they have damaged this plaintiff in the sum of thirty thousand dollars, or any other sum.

Paragraph three of the petition is admitted; that is to say, that on the 27th day of August, 1913, the petitioner was employed as a switchman in the yards of the freight terminals in Fulton County.

Answering Paragraph four of the petition, these defendants admit that on or about the date mentioned in paragraph three of the petition, the plaintiff, in the performance of his duties, went upon a cut of cars; they deny, however, that it was his duty to release all the brakes on said cars so that the engine of defendants might couple thereto and remove the same.

Answering Paragraph five, these defendants, from insufficient information, can neither admit nor deny the first allegation in said paragraph, as follows: "Your petitioner, in the course of the performance of his duties, released all of said brakes except one," they say that, for want of information, they can neither admit nor deny that, but they deny all the balance of paragraph five.

Answering Paragraph six, these defendants deny the allegations therein contained; these defendants qualify their general

104 denial of the allegations contained in said paragraph in the following manner: they deny that the petitioner was knocked from certain cars in the manner and as the result of the causes alleged; they admit that he fell from certain cars, as the result of his own negligence, and that he sustained certain injuries in consequence of said fall. They expressly deny that the said injuries were caused in the manner alleged in said paragraph six and elsewhere in said petition.

Answering paragraph seven, these defendants admit that the defendants joined in this action are common carriers by rail, and are carriers of interstate commerce, though they further aver that all of said defendants are also carriers engaged in intrastate commerce.

Interstate commerce means, in respect to railway companies, the carrying of passengers and freight between points in different states of the United States. Intrastate commerce means commerce within the state, carrying freight and passengers from one point to another within the State.

Paragraph eight of the petition is denied.

Paragraph nine is denied.

Paragraph ten is denied.

Paragraph eleven is denied.

Answering paragraph twelve, these defendants admit that the plaintiff has suffered the loss of his right arm, but they deny the inference contained in the allegation with respect thereto in

105 paragraph twelve, to the effect that he lost his arm in being knocked from cars in the manner previously described in his petition; and the further allegations of paragraph twelve are denied.

Answering paragraph thirteen, these defendants, from insufficient information, can neither admit nor deny that the petitioner was confined to his bed for six months; they deny the other allegations in said paragraph.

Answering paragraph fourteen, these defendants admit that the plaintiff has lost one of his arms, and to that extent is maimed and disfigured for life.

These defendants deny paragraph fifteen.

Answering paragraph sixteen, these defendants admit that, in losing his right arm, petitioner has suffered permanent injury, but they deny, however, that his capacity to labor and earn a living has been entirely destroyed.

Answering paragraph seventeen, these defendants, from insufficient information, can neither admit nor deny the allegations therein contained, as to the plaintiff's age. They, however, deny all the further allegations in paragraph seventeen, with respect to the amount that the plaintiff was earning at the time of the injury, and with respect to his earning capacity.

They deny paragraph eighteen, deny paragraph nineteen, and deny paragraph twenty.

106 Answering paragraph 21 of the petition, these defendants admit that on or about the date mentioned in paragraph 3, the plaintiff, in the performance of his duties, went upon a cut of

cars; they deny, however, that it was his duty to release all the brakes on said cars, so that the engine of defendants might couple thereto and remove the same.

Answering paragraph twenty-two, these defendants, from insufficient information, can neither admit nor deny the first allegation in said paragraph, as follows: "The plaintiff charges that your petitioner, in the course of the performance of his duties, released all of said brakes"; they say they can neither admit nor deny that, for want of information, but they deny all the balance of that paragraph.

Answering paragraph twenty-three, these defendants deny the allegations contained therein. These defendants qualify their general denial of the allegations contained in said paragraph in the following manner: they deny that the plaintiff was knocked from certain cars in the manner and as the result of the causes alleged; they admit that he fell from certain cars, as the result of his own negligence, and that he sustained certain injuries in consequence of his said fall; they expressly deny that the said injuries were caused in the manner alleged in said paragraph twenty-three and elsewhere in said petition.

Answering paragraph twenty-four, these defendants admit
107 that they and their co-defendants are common carriers by rail, and are engaged in interstate commerce; they expressly aver, however, that all of the defendants joined in the action are also carriers of intrastate commerce. Answering the following averment in paragraph twenty-four: "At the time of your petitioner's injury, defendants were engaged in interstate commerce, and petitioner was employed and engaged in the transportation of interstate commerce," these defendants respectfully aver that said allegation is a conclusion of law, and that no facts have been set up in paragraph twenty-four or elsewhere in the petition upon which the conclusion in question is based. These defendants say that, the averment quoted not being an allegation of fact, raises a question of law, and that, from insufficient information, they can neither admit nor deny said allegation.

Paragraph twenty-five is denied.

Paragraph twenty-six is denied.

Paragraph twenty-seven is denied.

Paragraph twenty-eight is denied.

Answering paragraph twenty-nine, these defendants admit that the plaintiff has suffered the loss of his right arm, but they deny the inference contained in the allegation with respect thereto in paragraph twenty-nine, to the effect that he lost his right arm in being knocked from the cars in the manner previously described in
his petition. The further allegations of paragraph twenty-
108 nine are denied.

Answering paragraph thirty, these defendants, from insufficient information, can neither admit nor deny that the petitioner was confined to his bed for six months; they deny the other allegations in said paragraph.

Answering paragraph thirty-one, these defendants admit that

plaintiff has lost one of his arms, and to that extent is maimed and disfigured for life.

They deny paragraph thirty-two.

Answering paragraph thirty-three, these defendants admit that, in losing his arm, petitioner has suffered permanent injury; they deny, however, that his capacity to labor and earn a living has been entirely destroyed.

Answering paragraph thirty-four, these defendants, from insufficient information, can neither admit nor deny the allegations therein contained as to plaintiff's age; they, however, deny all the further allegations in paragraph thirty-four, with respect to the amount that plaintiff was earning at the time of the injury, and with respect to his earning capacity.

The Louisville & Nashville Railroad Company, one of the defendants in the above stated cause, answering this plaintiff's petition, says:

Answering the first count, it admits the allegations of paragraphs one and three of the petition; it denies the allegations of
109 paragraph 2; it admits that, on or about the date mentioned in paragraph 3, plaintiff, in the performance of his duties, went upon a cut of cars; it denies that it was his duty to release all the brakes on said cars, so that the engine of defendants might couple thereto and remove the same. For lack of sufficient information, it can neither admit nor deny any of the allegations of paragraph 5, as to what petitioner did; it denies all the remaining allegations of paragraph 5. It denies the allegations of paragraph 6. It admits the allegations of paragraph 7 of the petition. It denies the allegations of paragraphs 8, 9, 10 and 11 of the petition. For lack of information, it neither admits nor denies the allegations of paragraphs 12, 13, 14 and 15 of the petition; it denies the allegations of paragraph 16 .

In answering the second count, this Louisville & Nashville Railroad Company, one of the defendants, admits the allegations of paragraph 18 in the petition. It denies the allegations of Paragraphs 19 and 20 of the petition. Answering paragraph 21 of the petition, it admits that, about the date mentioned in paragraph 20, plaintiff, in the performance of his duties, went upon a cut of cars; it denies that it was plaintiff's duty to release all the brakes on the cars, so that defendants' engine might couple thereto and remove the same. For lack of sufficient information, defendant can neither admit nor deny the allegations of paragraph 23, as to what was done by petitioner; it denies the remainder of the paragraph.
110 It admits the allegations of paragraph 23. It admits the allegations of paragraph 24, except the allegations that, at the time of petitioner's injury, defendants were engaged in interstate commerce, and petitioner was employed and engaged in the transportation of interstate commerce, which it avers are conclusions of law, no facts being stated in that paragraph or elsewhere in the petition, upon which such conclusion is based, and therefore defendant, for lack of sufficient information, can neither admit nor deny said allegation.

This defendant denies paragraphs 25, 26, 27, 28 and 33. For lack of information, it says it can neither admit nor deny paragraphs 29, 30, 31, 32 and 34.

These are the answers, Gentlemen, in writing, of the defendants in the case, and you will have them out with you, and can read them, and see with more particularity than the Court has given you, exactly what these defendants deny, and what they admit, and what they contend for.

You can compare the paragraphs denied, and the paragraphs admitted, of the original petition, both as to the first and second counts, and see for yourselves exactly what is contended for and stated and denied. But the substance of these answers, Gentlemen of the Jury, is a complete denial of any liability to this plaintiff. These defendants say that they were guilty of no negligence in respect to him, that they failed to perform no duty in respect to him; they say that he is not entitled to recover anything. They contend that, if he was hurt, he was hurt by his own fault;
111 and not by any fault of theirs; and they deny the extent of his injuries; in fact, it is a complete denial on the part of these defendants of any liability to the plaintiff, and a complete denial of his right to recover, a complete denial of his right to have any verdict in this case at your hands.

Upon the filing of these answers, Gentlemen of the Jury, the law casts the burden of proof upon the plaintiff to establish his right to recover by a preponderance of the evidence in the case. The law holds the scales perfectly balanced between the plaintiff and the defendants at the commencement of the trial; if, at the end of the trial, they stand still perfectly balanced, there could be no recovery for the plaintiff; if they go down by the superior weight of the evidence, a preponderance of it, on the side of the defendants, the plaintiff could not recover; but for the plaintiff to recover, they must go down on his side by a preponderance of the evidence on every material allegation that he makes in his petition.

In this connection, I wish to instruct you that the plaintiff, if he is entitled to recover, must recover upon the acts of negligence as he states them in his petition. To make that plain, if the plaintiff in a case were to establish that the defendants were guilty of negligence, he could not recover on account of that act of negligence on the defendants' part, unless he had stated that in his petition as an act of negligence; or, in other words, the plaintiff can-
112 not state one ground of negligence, or a number of grounds of negligence, and recover on any ground of negligence not stated in his petition.

This question of burden of proof and preponderance of evidence indicates that you must weigh the evidence; you look to all the facts and circumstances of the case, as they are disclosed by the evidence. In considering the testimony delivered by witnesses in the case, the law says that you may take into consideration the manner and deportment of witnesses, as they have been examined in your presence on the stand; you have the right to consider the opportunities the witnesses had for knowing the facts to which they have testified; you

have the right to consider whether witnesses are parties or not parties to the case; you have the right to consider whether they are related or not related to the parties in the case; you have the right to consider the probability or improbability of the truth of the facts testified to by the witnesses; you may judge of the personal credibility of the witnesses, in so far as it may legitimately appear on the trial; and you may consider the number of witnesses, though the law declares that a preponderance of the evidence is not necessarily with the greater number of witnesses; that is a matter for the jury to determine.

The law makes it your duty, Gentlemen, to reconcile conflicting evidence, so as to make all the witnesses in the case speak the truth, and perjury be imputed to none of them, so, if there is con-
113 flicting evidence in the case, it would be your duty to reconcile it, if it can be done, so as to make all the witnesses speak the truth, and perjury be imputed to none of them.

Gentlemen of the Jury, the law makes you the exclusive judges of the facts of the case, the exclusive judges of the testimony, and the weight thereof. The Court expresses and will express, no opinion as to what has or what has not been proven. The obligation you are under is to find a true verdict, according to the opinion you entertain of the evidence produced to you, without favor or affection to either party, and according to the law as given you in charge by the Court. Now, I mention this particularly to call your attention to the fact that the jury ought to listen carefully to the charge as the Judge gives it to them. Just as you listened to the witnesses, and tried to discover the truth from what they testified, so you *you* must listen carefully to the law as given you in charge by the Court, and try to understand the law, in order that you may apply it to the facts in the case, and reach a proper conclusion by your verdict.

As stated before, the plaintiff has brought his suit in two counts, in both of which he substantially charges his injuries to have been received at the same time and place; in fact, in these counts, the same injuries are alleged, substantially the same acts of negligence, and the same amount of recovery is claimed by the plaintiff.

In the first count, the plaintiff claims the right to recover
114 against the defendants under what is known as the "Employers' Liability Act of the State of Georgia," applicable to injuries done by common carriers, railroad companies, to their employees, in which the plaintiff alleges that the defendant companies were in the operation of a line of railroad into and through the County of Fulton, and that they maintained and operated joint freight terminals and a joint freight depot in the City of Atlanta in said County; and he says that, while engaged in the service of these defendants as an employee, he was injured and damaged as set out in the first count of his petition. I have already enumerated the acts of negligence charged in the first count.

In the second count, the plaintiff alleges that defendants were lessees of railroad lines in the State of Georgia, in the County of Fulton, and that they were engaged in interstate commerce, that is to say, in the carriage of passengers or freight, or both, from and to

points in and out of the State of Georgia, and that they were operating these joint terminals, and that that was a matter connected with interstate commerce, and he says that he was employed by the defendants in operating, as an employe, a part of their work of interstate commerce. The Court has already gone into details as to the acts of negligence alleged by the plaintiff in the second count, and as to his allegations as to the extent of his injuries.

It is necessary for you to remember that there are two counts in this petition, the first one brought, as stated, under the law
115 of Georgia, and the second one under the laws of the United States, passed by its Congress. As before stated, you will have this original petition out with you, and you can see with more particularity than the Court now gives you, as to what is alleged and charged in these two counts.

If you find, under the evidence, that the defendants were engaged in interstate commerce at the time and place of the alleged injuries, and that the plaintiff was in the employ of the defendants as an employee, in their interstate commerce, then you will find, if you find for the plaintiff, that he is entitled to recover under the second count. If you find from the evidence that the plaintiff is not entitled to recover on either count, you would find for the defendants.

If you find that the plaintiff is entitled to recover, but that the defendants were not engaged in interstate commerce, or that, if they were engaged in interstate commerce, the plaintiff was not in their employ in the business of interstate commerce, then you would pass to the consideration of the first count in the petition, which alleges that the plaintiff was injured and the defendants are liable therefor, under the laws of this State. In considering this count, if you should find that the plaintiff is not entitled to recover under the second count or under the first count, you would find for the defendants.

The Court will now take up the first count in the petition
116 of the plaintiff, which, as the Court has already said, is brought under the statutes of this State known as "The Employers' Liability Act of the State of Georgia." This law of the State of Georgia provides that every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such common carrier, for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. In this case, of course, you will understand that there is no allegation of negligence in respect to the track, roadbed, works, boats or wharves—"provided, nevertheless, that no recovery shall be had hereunder, (under this Georgia Employers' Liability Act) if the person injured brought about his injury by his own carelessness, amounting to a failure to exercise ordinary care, or if he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence."

Now, Gentlemen, as I will use these words "ordinary care" a number of times in this charge, the Court desires to impress upon you a

correct definition of them. Ordinary care means that degree of care and caution which every prudent person would exercise under the same or similar circumstances.

This law further provides that, in all actions hereafter
117 brought against any such common carrier by railroad, under and by virtue of any of the provisions of this, the preceding section, the substance of which I have just stated, or the four succeeding sections, to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided, that no employe who may be injured shall be held to have been guilty of contributory negligence in any case where the violation by said common carrier of any statute enacted for the safety of employes, contributed to the injury of such employe. The four succeeding sections above referred to, relate to risk of employment contract exempting from liability, and set-off of indemnity, limitation of actions, and a declaration of what the words "common carrier" mean.

The law under consideration provides further that, in any action brought against any common carrier under and by virtue of the provisions of the two preceding sections, to recover damages for injuries to any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employees.

The general rule of law is that a servant, that is to say,
118 an employe, assumes the risks of his employment, and is bound to exercise his own skill and diligence to protect himself. That is the general rule, and in this case, and under this first count, if you believe that this plaintiff was injured, and that his injury was brought about by the negligence of the defendants, as alleged in his petition, and that such negligence was not due to any defects or insufficiency due to its negligence in its cars, engines, appliances or other equipment, then this general rule as to assumption of risk by the plaintiff would apply.

If, however, he was injured by the negligence of any of the officers, agents or employes of such carrier, in the operation of its engines, cars or machinery, and not on account of a failure to provide such, or defects in such, then the general rule would apply, and the plaintiff could not recover if he brought about his injury by his own carelessness, amounting to a failure to exercise ordinary care, or if, by the exercise of ordinary care, he could have avoided the consequence of the defendants' negligence, if they were negligent.

The fact that the employe may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, would not be a bar to recovery, but the damages would be diminished by the jury in proportion to the amount of negligence attributable to him. As before stated, no such employe who may be injured shall be held to be guilty of contributory negligence in any

119 case where the violation by such common carrier of any statute enacted for the safety of employes caused or contributed to the injury of such employe.

Under this first count, if you believe that the defendants were common carriers, and that the plaintiff suffered injury while he was employed by them as such carriers, then for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier- in the operation of their engines, cars or machinery, but not by reason of any defects or insufficiency in said cars, engines or machinery, the plaintiff would be entitled to recover, unless he brought about his injury by his own carelessness, amounting to a failure to exercise ordinary care, or if he, by the exercise of ordinary care, could have avoided the consequences of the defendants' negligence, if they were negligent.

I have already explained to you what the situation would be as to this contributory negligence and assumption of risk, if the plaintiff's injuries were produced by defects, or by a failure rather of the defendants to furnish appliances, safety appliances required by law.

If the plaintiff was injured, as just before stated, the fact that he may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, would not bar his recovery, but his damages would be diminished by the jury in proportion to the amount of negligence attributable to him.

If you do not believe, under the evidence in this case, that 120 the defendants were negligent in the particulars charged in the petition in the first count, then, on that count, you would find for the defendants.

If you believe, under the evidence, and under this count, that the defendants were negligent in the operation of their engines, cars and machinery, and not in respect to the appliances required by law, then the plaintiff would be entitled to recover, reducing his damages according to the proportion you believe negligence may be attributable to him; but, as before stated, if you believe that the plaintiff is entitled to recover, and that the defendants' negligence consisted in a failure to comply with any law enacted for the safety of employes, and that negligence caused or contributed to the injury, then the plaintiff would be entitled to recover without diminution of damages on account of contributory negligence, if any such existed.

The second count in the plaintiff's petition charges that the defendants are common carriers engaged in interstate commerce; that is to say, they were engaged in commerce between some of the several states of the United States; and the law says that common carriers by railroad, while engaging in commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, if such injury results in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defects or insufficiency due to its neg-

121 ligence, in its cars, engines, appliances, machinery or other equipment.

Under the Act of Congress known as the "Federal Employers' Liability Act," it is provided that common carriers engaged in interstate commerce shall provide every car used in moving interstate commerce with automatic couplers, and to maintain them in proper condition at all times. If you should believe, under the evidence in this case, that these defendants, at the time and place where this injury is alleged to have occurred, were engaged in interstate commerce, and that the plaintiff was in their employment in such interstate commerce at the time and place of the alleged injury, then this Federal Employers' Liability Act would apply to the case; and if you believe that this plaintiff was injured as alleged, and that such injury resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier, as charged in the petition, or by reason of any defects or insufficiency due to their negligence in their cars, engines, appliances, machinery or other equipment, then the plaintiff would be entitled to recover, as further explained.

If you believe, under the evidence, that the plaintiff was injured by the defendants while they were engaged in interstate commerce, and while he was in their employment in such commerce, and he was injured by the negligence of the defendants in the operation of their cars, locomotives or other machinery, and not by a

122 failure to provide the safety appliances provided by law, then, if the plaintiff was guilty of contributory negligence, he may recover, but his recovery shall be diminished in proportion to the amount of negligence attributable to him.

But if he was injured by the negligence of the defendants by a failure to provide the required safety appliances, or of maintaining them in a safe condition, then this doctrine of contributory negligence would not apply, and his recovery, if he is entitled to recover, could not be diminished on that account.

The general rule of assuming risk of employment will apply to this count, but if the injury was caused in whole or in part by a failure to provide and maintain the safety appliances required by law, automatic couplers in this case, this doctrine of assumed risk would not apply, because under the Act, the employe could not be held to assume any risk incident to a violation of law by the defendants, if they did violate it.

Before the plaintiff can recover on the allegations of his petition that the cars in question were not equipped with automatic couplers which would couple with each other by impact, he must have shown to your satisfaction by a preponderance of the evidence that, at the time of the injury, the cars had either never been equipped with such automatic couplers, or that, having been so equipped, such couplers had become so broken or out of repair or insufficient, that they

123 could not be made to couple automatically by impact. It is the duty of railroads engaged in interstate commerce to provide every car used in moving interstate commerce with automatic couplers, and to maintain them in proper condition at all times and

under all circumstances. No particular kind of coupler need be used; the sole requirement is that couplers must be used that will couple automatically by impact, and which can be uncoupled without the necessity of men going between the cuts of cars to uncouple them. And he must also show by a preponderance of the evidence that the injury which he claims to have received was caused or contributed to by such failure to equip the cars, or to maintain such equipment.

If you find that the plaintiff was injured by the negligence of the defendants, and that, at the time he sustained such injury, he was employed by the defendants in interstate commerce, and the defendants were engaged in interstate commerce, it would be your duty to disregard entirely the allegations of the first count of the plaintiff's petition.

Should you find that the defendants were negligent, and in favor of the plaintiff, under the second count of this petition, but find that the plaintiff was himself lacking in ordinary care, which contributed to his being injured, you could not find full damages in his favor, that is, such an amount as he would have been entitled to recover if he had not been negligent, but only a proportionate amount, bearing the same relation to the full amount as the negligence
124 attributable to the defendants bears to the entire negligence attributable to both the plaintiff and the defendants.

If he was injured by a failure to provide the equipment required by the United States statute, and that failure in whole or in part brought about his injury, no abatement of the amount of his recovery, if he is entitled to recover, could be made.

One ground of negligence is the charge that the engine struck the cars a violent, unusual and unnecessary blow when it attempted to couple thereto. If you believe that this, under the evidence, was a necessary or a usual blow, such as was usual and necessary in the conduct of such business, it would not be a good ground of negligence. If you believe, on the contrary, that it was an unusual and unnecessary blow, as charged in the petition, and that, in giving it, these defendants were negligent, then you will consider it, and it may be a ground of negligence for which the plaintiff might recover if otherwise entitled to recover under the law that I have given you in charge.

Gentlemen, the plaintiff in this case claims several items of damages. He says that he lost time on account of the injuries that he received, and he says that he suffered great pain and suffering, and that he has been permanently injured; he charges that his earning capacity has been totally destroyed.

If he is entitled to recover, if he lost time on account of the injury, that would be a legitimate item of recovery; you look
125 to the evidence, and see whether he lost any time on account of his suffering and disability which he says was brought to him by this injury, and see what it was reasonably worth, what it amounted to.

He says, too, that he suffered great pain and anguish, pain and suffering, on account of these injuries, and that he will continue to suffer pain. The law fixes no standard by which you can measure

in money pain and suffering; that is left to the enlightened consciences of upright, intelligent impartial jurors; you look to the nature and extent of the wound, the character of the wounds, see whether they are such as would produce no pain, or little pain, or much pain, and how long it has lasted, and will continue to last, if you believe it is to be suffered in the future. Then, if you think he is entitled to recover, and that he is entitled to recover for pain and suffering, fix such sum as would be reasonable and just to the plaintiff, and not oppressive to the defendants.

This plaintiff claims that he has been permanently injured, that his capacity to labor and earn money has been, he says, totally destroyed. The plaintiff has put in evidence certain mortality tables, known as the Carlisle Mortality Tables; that is a table that shows the reasonable expectation of life of an average man at a given age; and then another table, which shows the value of annuities on single lives, according to that table.

If you find that the defendants are liable, it would be your duty to fix the measure of the plaintiff's damages. Among other
126 things, he claims that he has been permanently injured, and that his capacity to labor and earn money has been decreased, and that this condition will continue to the end of his life. If this contention has not been proven, that is, this contention that he has been permanently injured, to your satisfaction, you would have no occasion to consult the tables concerning the use of which you will presently be instructed, but should disregard them entirely; but if you find that the defendants are liable, and you believe from the evidence that the plaintiff was capable of earning by his labor so much per year, and because of personal injuries wrongfully inflicted upon him by the defendants, his earning capacity has been materially reduced, or destroyed, and if the injuries were of such a permanent or lasting character that his decreased capacity to earn money will continue through life, then the following instructions will be pertinent.

Certain tables are in evidence before you; these are the tables, you will have them out with you; one of them is the Carlisle Mortality Table, and the other is a table showing the value of annuities. We will call the first the mortality table, and the second the annuity table. They are not binding upon you, and you are not obliged to use them, or either of them; if you use neither, you need not consider the instructions now about to be given you, but, as these tables are in evidence, and you have the right to avail yourselves of the assistance to be derived from them, it becomes proper to ex-
127 plain them, and inform you in what manner and for what purpose each can be made serviceable. Care, however, must be taken to avoid confusion, and you should be very particular not to use one of them where the other ought to be used. You are also cautioned that you cannot advantageously use both in one and the same calculation; while the proper use of these tables separately might lead to the same result, using them conjunctively or indiscriminately in the same calculation, or without understanding the

real purpose they are respectively intended to serve, will surely lead to error.

You should ascertain from the evidence the annual loss which has been occasioned to the plaintiff by reason of his injuries; to do this, you will have to take into consideration his earning capacity before he was injured, and the per cent or ratio to which that capacity has been diminished; seek honestly to reach a just conclusion from the facts before you as to what amount would have fairly represented the yearly earnings of the plaintiff to the end of his life, had he not been injured, and as to the proportion, whether one fourth or one half, or more or less than these fractions, or all, in which such earning capacity would be reduced because of his injuries. In estimating what would have been the plaintiff's probably earnings through life, if his laboring capacity had remained unimpaired, you should give due weight to the various contingencies that will be pointed out to you before concluding these instructions. It is proper to re-
128 mark just here that the plaintiff's age at the time he was injured, and his then probable expectancy of life, may be considered in arriving at what would have been his average yearly earnings, but for the injury; if, in your opinion, and in view of the evidence, his earning capacity would have varied at different periods of his life, in case there had been no injury. Another and more direct use which you can make of the figures representing such probable expectancy of life, will presently be stated.

In fixing upon this expectancy, you may consult the mortality table, which will now be explained. This table is designed to show the expectancy of life which would be entertained by average persons of given ages; the only material information you can derive from it is the time which an average person of equal age with the one under consideration in the present case, may be expected to live. This table has two sets of columns, marked respectively "Age," and "Expectation years;" you will find that on them. If it should be desired to ascertain how long a person of avergae health and constitution, age thirty-three years, would probably live, you will look for the figures 33 in this age column, and opposite these figures, in the expectation years column, on the right of the age column, you will find figures 32.36, which would indicate that such person probably had thirty two and thirty six-one hundredths years to live. In the nature of things, there can be no certainty whether any particular individual will live for a lonfer or
129 shorter period than the probable expectancy of an average person of his age, as laid down in this table. In estimating the probable length of a given man's life, as compared with the average duration of life of one of the same age, his health, occupation, habits and surroundings, just as they are disclosed by the evidence, ought to be considered, and the proper weight should be given to all these things in fixing the expectancy of life, diminishing or increasing the figures laid down in the table according to the facts in the particular case under investigation.

The age thirty-three years has been selected merely for illustration; you, of course, when you use this table, would select the age

appropriate to the present case; that is, look to the evidence, and see if it discloses what was the age of this plaintiff, and then, opposite that age, see what his expectation was. Having from the evidence fixed as accurately and as fairly as you possibly can, the number of dollars representing the yearly loss of earnings occasioned to the plaintiff by his injuries, and having ascertained from the mortality tables, in connection with all the other evidence before you, his expectancy, that is, the number of years which, at the time of his injury, he would reasonably have expected to live, you could, by multiplying one of these numbers by the other, determine approximately the amount of his loss. This gross amount, when ascertained, would, of course, have to be reduced to its present value, that is, to a sum which, paid down all at once, would be the just and legal cash equivalent of such gross amount. The present
130 value would necessarily be less than the gross amount, and the longer the life, the greater would be the difference in these respective sums. If you pursue the course above indicated and arrive at the gross amount in the manner which has just been explained to you, it would then be incumbent upon you to make the necessary calculation for ascertaining its present cash value, but inasmuch as the same result can be more speedily reached by availing yourselves of the work which has been done in compiling the annuity table, you may prefer to resort to it; in that event, you would not find it necessary to arrive at the gross amount, and then reduce it to its present value, for the use of the annuity table enables you to accompiish the same end by a shorter process. The following illustration will aid you in understanding how to use this table:

Now, as a matter of illustration, suppose a man thirty three years old, capable of earning forty dollars a month, or four hundred and eighty dollars a year, was so injured that he could only earn twenty dollars a month, or two hundred and forty dollars a year, and that this decreased capacity to earn money would last during his entire life; if it was certain that, but for his injuries he would have continued to earn the full amount of four hundred and eighty dollars every year as long as he lived, his loss on account of his injuries would represent an annuity of two hundred and forty dollars, and if entitled to recover for such loss, his damages as to this matter would be such an amount as would be the fair cash equivalent
131 of an annuity of two hundred and forty dollars, payable in annual instalments until the end of his life.

To arrive at such amount in the case supposed, the annuity table could be made available in the following manner: First, you would look in the column marked "Age," until you found the figures 33; opposite these figures, you would find, in the column marked "seven percent," that being at the right of the age column, the figures 11.448; the meaning is that an annuity of one dollar in favor of an average person thirty three years old, and to continue through life, would, on a seven percent basis, be worth cash down eleven dollars and forty four and eight tenths cents; therefore, multiplying four hundred and eighty by the figures 11.448, would give you the cash value of a life annuity of $480, viz: $5,495.54. Therefore, if you

took two hundred and forty, say that there was a reduction from his annual income of four hundred and eighty dollars, down to two hundred and forty dollars, multiplying that two hundred and forty by these figures 11.448, would give the cash value of a life annuity of $240, at $2,747.52.

This annuity table can be used for any age up to 103, and with reference to any sum of money representing or standing in the place of an annuity. The illustration shows you how to use the table; you must not confuse the figures mentioned in it with the actual figures of the case on trial; on the contrary, you should be governed as to those matters by the evidence. For instance, you will have noticed that the case supposed in the illustration is one where
132 the earning capacity was reduced one half; it might be that it was reduced two-thirds, or one-third, or one-fourth, or it might be destroyed; the true percent of the person injured must be in each case ascertained from the evidence, the question being, what proportion does it show the ability to earn money has been lessened. You will also observe that the illustration given rests upon the assumption that the person would have actually earned four hundred and eighty dollars each year during the entire period of his expectancy if he had not been hurt, and his consequent loss on account of decrease in ability to labor is calculated upon that basis.

It rarely, if ever, happens that a man labors every day until his death, or receives all the while a fixed and regular income from his labor; nor does his capacity to earn money often remain undiminished to old age; in arriving at the amount to be allowed as damages in any particular case, these things should be carefully borne in mind.

The illustration given is also based upon the further assumption that the supposed person was one whose expectancy of life was that of an average man; if, in any case, the expectancy of the person under consideration would, under the evidence, have been probably greater or less than that of an average man, the amount of the damages to be allowed should be increased or diminished accordingly.

Applying these instructions to the case that you are now considering, you will, of course, be governed by its facts and circum-
133 stances, as proved. Feebleness of health, actual sickness, loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages and the increasing infirmities of age, with corresponding diminution of earning capacity, and other causes, may contribute in greater or less degree to decreasing the gross earnings of a lifetime. In estimating damages, proper allowance and deduction should be made in favor of the defendants for any diminution in income from labor which would have resulted from any of these sources. The defendants are not responsible for the consequences of the acts of others, not their agents, nor for results which would, in any event, and without reference to the conduct or negligence of the defendants, have come to pass. In arriving at the cash value of the life of a person claiming to have been permanently injured, and to have had his capacity to earn money

totally destroyed, you should take all these matters into consideration, and give them due weight.

If the defendants are not liable at all, the instructions which have been given you concerning these tables should be entirely disregarded. If liable, and you see fit to use the tables, or either of them, an observance of these instructions will aid you in reaching a proper conclusion as to the amount of damages to be allowed.

Gentlemen of the Jury, in giving you the rules by which you may measure damages, the Court, of course, does not mean to intimate that you should find damages, or that you should not. These instructions as to the manner of estimating damages are
134 given in the event the plaintiff is entitled to recover, and that as to these tables and the use of them that he has been permanently injured.

If you should find for the defendants, the form of your verdict will be: "We, the Jury, find for the defendants."

If you find for the plaintiff, the form of your verdict will be: "We, the Jury, find for the plaintiff, so many dollars." If you were to find that the plaintiff was entitled to recover, and that he was entitled to recover for more than one item of damages, you would not specify in detail that he was entitled to recover so much for one thing and so much for another, but you would express the amount of his recovery, if you find for him, in one sum, and the form of your verdict, as I have stated, if you find for the plaintiff, will be: "We, the jury, find for the plaintiff, so many dollars."

It is necessary, Gentlemen of the Jury, for you to express in your verdict on which count in this declaration you will find, if you find for the plaintiff. As I have stated before, if you find for the defendants, the form of your verdict will be: "We, the Jury, find for the defendants"; and your foreman will sign that, and date it. If you find for the plaintiff, then you will say on which count, and in giving you this form, I will amend the instructions as to that by saying that the form of your verdict, if for the plaintiff, will be: "We, the Jury, find for the plaintiff, on the first count in the declaration, or on the first count in his petition, so many dollars"; or, if you find for the plaintiff on the second count, the form of
135 your verdict will be: "We, the jury find on the second count, for the plaintiff, so many dollars."

Whatever verdict you find ought to be written on this original petition, which I designate for your convenience the yellow paper, and it ought to be dated and signed by your foreman.

Retire, Gentlemen, and make up your verdict.

The above and foregoing is hereby approved as correct, and is ordered filed as a part of the record in the above stated case.

This, the — day of July, 1915.

W. D. ELLIS,
Judge Presiding.

Filed in office this the 30th day of Aug., 1915.

J. C. LEWIS, *D. Cl'k.*

136 Fulton Superior Court, Judge Ellis Presiding.

No. 29692.

O. Y. LAYTON
vs.
THE ATLANTIC COAST LINE RAILROAD COMPANY et al.

Brief of the Evidence.

O. Y. LAYTON, sworn in his own behalf, testify as follows:

My name is O. Y. Layton. I am plaintiff in this case. On the 27th day of August, 1913, I was working in the yards of the Atlanta Joint Terminals as a switchman. Gravett was the conductor and Hogg, Dodgen, Cheeves and myself were the switchmen, Speer was the engineer, and a colored fireman. An accident happened to me that night about 9:45 on Pearl Street crossing in the yard, on track eight. I was letting off brakes on five cars of coal that I had rode in on that track. They came in on the L. & M.

(Counsel agreed: Mr. Garnett, the conductor in this case, is dead.)

The next switching movement that was to be made with those cars was to pull out the balance of the train and switch it up—those cars I was on—and the balance of our train on the same track. There were several different tracks there, different cars run on different tracks. They go to different places, different roads and different trains. Those cars were loaded with coal. First I let off all the brakes except one on the lower end; it wasn't a good brake, wouldn't hold those two cars. I rode in there at first and the end brake
137 on the lower one wouldn't hold both cars, and I set that one as tight as it would go, and then ran back to the other one and stopped the cars with that. The engineer hit those cars and knocked them. The engine was coupled to a stock car. He hit them an unusually hard lick. It made me fall down on top of the car. I was on top of a car of coal and I fell on my face like. The cars did not couple. They rolled on down and hit the balance of the train. The brake was holding them before he hit them. It was a little down grade in the direction that the engine came. They all rolled down and hit the balance of the train and knocked me off when it hit. It would be hard to say how fast they were going, but it hit them mighty hard. While they were rolling down I got up because I was afraid I would roll off. I wanted to get up to my stand and brace against them when they hit, because I knew they were going to hit; they didn't have far to go before they did hit. When that cut of cars hit that lower cut, I fell and rolled off at the lower end, in between the last two cars. I was something like ten feet from the end of the car. I fell right on the rail. Nothing but my arm got run over.

I was then taken to the Baptist Hospital, Luckie Street, and stayed there fifteen days. They took my arm off. Besides, I had three or four cuts on my head there, and then I was bruised in the back. I

have suffered pain from my back, and do yet. It makes me nervous and it hurts me as a general rule all the time, more or less. Of course, it hurts me more at times than it does at others. I
138 walk around; I am not helpless or anything like that, but when it comes to doing anything, I can't do it because I haven't got the strength. I can't sleep like I used to.

I had a spell with it three or four weeks ago. I was taken sick at the ice house and went home, walked across the South Decatur line and caught the car there and rode down to the house. I suffered pain all over me, my muscles and nerves were just hurting me all over, just felt like they were all torn up in me. I stayed in bed from Wednesday afternoon until Monday morning. Dr. Fincher treated me. I have pain from my arm that was cut off, feels like my hand was there and trying to catch hold of something. It hurts some, but not like it did for a long time, but it still pains me yet at times.

At the time I was hurt I was working extra. I don't think I ever drew less than $55 and I drew from that to $78 and something the month I got hurt. I had worked all that month, making $3.40 a day and $3.60 at night. A regular man would get in from twenty-six to thirty days. I went to work there on the 19th day of May, 1913. I now stay in the Kirkwood office of the Atlantic Ice & Coal Company, just sit around there and answer calls and weigh out ice and check in a car or something that comes in. I get six dollars a week.

I was thirty-four years old at the time I was hurt.

I worked for Walker Brothers before coming to Railroad as switchman, for $22.00 per week, from the 1st day of February to the 17th day of May. Before that I was with the Parcel De-
139 livery Company at $18.30 a week for about seven years.

This accident happened in this County.

Cross:

I went to work in the yards as a switchman on May 19th and was hurt August 27th. The yard is from Pryor Street on out towards Decatur. Part of that yard is a gravity yard, down grade coming back this way from Delta Street to Pearl Street, a block, and then it is down grade some on down to the yard office, some five or six blocks. The object in building that down grade in that yard is so that when you turn a car loose up at one of the points where that grade is high (they always called it the hill), in switching trains, the car will roll down hill into different tracks. I estimate there were twenty or twenty-five tracks across the yard. Ten or twelve tracks were used for this switching by which cars were allowed to roll downhill. My engine worked "the hill." It was headed towards Atlanta that night. A train would come into the yard with thirty or maybe more freight cars, some destined to the Central Railroad, Seaboard, Southern, West Point or Georgia Roads. We would break up that rain—that is, take out the cars that were destined for the Southern, the Central or any of the other roads. All the cars destined to a particular railroad would

not be together in that train, so we would take out the first car we came to, say it was for the Atlanta & West Point Road, and put it over on the Atlanta & West Point transfer; then a car that was destined to the Southern Railway and put it over on the
140 Southern Railway transfer, and so on, setting up brakes on them to hold them. That made up the transfer train for the different roads. That was downhill all the way and the engine would kick the car loose and let it roll down to the cars already in the track. That was the purpose of the gravity tracks. When the train comes in to be cut up so the different cars can be put in the different transfers, the road engine is cut off and the switch engine takes it to the top of this hill, and the cars are cut loose there and roll by gravity in the different tracks that they are intended for.

The night I got hurt I was on No. 8, the Central transfer track. There wasn't any cars on it until the L. & N. came in there and left the train on it. We were working up that train. We had pulled as near half of it as we could get and after we got through with that went back in there to pull up the other half to work it up. The first half of the train was switched up by cutting the different cars off and allowing them to roll down by gravity into the different tracks they were intended for. The balance of the L. & N. train was coupled together. Those five coal cars were for Seaboard or Central. They belonged on the same track. We had to push them down with the balance of the L. & N. train and switch them over. We had to pull them out before we could get the L. & N. train out. Those five coal cars were something like a couple of car lengths or about eighty feet from the balance of the L. & N. train. A car is thirty-six to forty feet long. I was on one of those five
141 cars—the one next the end towards the depot. There were three coal cars between me and the end of that cut back towards Delta Place. I had let off all the brakes except one and that was on the end car nearest to the Union Depot. I knew that it was necessary that the engine couple to those five cars to get the balance of the train on that track out, and when the switch engine came back, that it had to couple to the cars I was on and then had to roll on down and couple to the balance of the train. That is the way all the movements out there were made. My engine was headed towards the depot and a stock car was coupled in front of it. There were no other cars between the stock car and the five cars I was on. Of these five coal cars two were wooden and three iron. I couldn't tell what railroad they belonged to. The car I was standing on was a wooden car, a flat car with sides up a certain distance, and loaded with coal. I was running along on top of it when I noticed — engine coming in. I was about eight or ten feet, or something like that, from the end of this car I was on, going to the lower end to let off last brake. I stood still and tried to keep from falling; I knew the engine would hit it, I didn't know how hard, and I always steadied myself, just propped myself. When the engine and car came in to couple to the five cars, it hit them and I fell down on my hands and face about ten feet from

the end of the car. At that time I was facing the engine; I turned around when I saw him coming in there. I was knocked down towards the engine. The engine did not couple to my cars. I had just about gotten up and got straight when they struck the
142 other cars. I didn't think they coupled, but the engineer never did stop until they hit the other cars.

This happened at 9:45 P. M. The headlight of the engine gave light between the cracks of the stock car and I could look back three cars and tell that the couplers had not coupled. I could tell that by the way they rolled and the way they did; if they had coupled they would have made a sudden stop when they coupled, and they never did make a stop. I couldn't say positively because I don't remember, I didn't have time to look. I couldn't swear that they coupled or did not. I knew those other cars were down there and that the cars I was riding had been knocked on down the hill and were obliged to run into the other cars. I fell down, then I got back up, riding on down. I didn't ride far because I hadn't been up no time when we struck. I just got up and turned around and faced the other way. When they hit the last time it threw me forward. It depends on which way you are going. If you are facing that way it would throw you forward; facing the other way it would throw you backwards.

When I was thrown off those cars I wa*ns*'t about the brake. They have an end brake which sets about the middle of the end. Those cars have what is called a deck platform down below the top of the end of the car. It ranges different heights; I couldn't tell you about that car. The dog and wheel that controls the brake is on the platform. The staff goes down thr*ew* the wheel to the platform, so that in setting up the brake you have to stand
143 on the platform. I had ridden these cars in there myself and set up brakes on all of them. Before I was knocked off I had let off all of them except one on the lower end towards the depot. I started to letting the brakes off on the end car right where I was knocked off, started there and went to the upper end and was coming back when he came back on me. I left that end brake on to let it off last. That brake was on the end towards town, as well as I remember.

In those movements couplers don't couple at times. That has happened to me some. You may expect it or not expect it. After all these different cars are put on this transfer track, the crew goes through every coupling to see whether it is coupled or not, and whenever you find one uncoupled you have got to couple it before you haul the train. In those switching movements you can expect the car you are on to couple, or not to couple, and if it doesn't couple you have to later go and couple it up, because sometimes you ride a car down in there and put a brake on the end of the car, and it will go, and if it was just like this one it never showed it, and you can expect to find them that way after putting them in there. If the couplers are left half open they won't couple, but it is our place to look after that and see when we go in there. Or sometimes there might be a right smart curve which will keep

them from coupling because they don't come in opposition with each other, and sometimes, not very often, you hit them so hard they won't couple. The coupler on one car has a contrivance to catch on to the coupler on the other car, like my two hands.
144 The more dead certain they are hit, the more dead certain they are to couple. I expect I don't know whether they hit square or not. I wouldn't say. In coupling the engine generally moves at different speeds, from two to four miles an hour, or something like that. Sometimes they are made when the train is moving much faster than that. On the hill there the man was the judge of making the couplings himself, as a general rule, because he rode the car in. I never did see one hit very hard; I have seen them come in faster than they did at other times.

These are my pay checks that I actually earned out there.

I do not know what kind of couplings these two cars were equipped with. I never did pay any attention.

After I was hurt I was not able to do anything for nine months, but I didn't stay in bed while I was at home; I would get — and come to town, ride the street car to the doctor's. I went to the hospital on the night of the 27th and left there on the day of the 11th, fifteen days. Dr. Garner, the surgeon of the Railroad, and his partner, Dr. Harper, treated me at the hospital. My arm healed up fine. After I got out of the hospital and went home I went to Dr. Garner's office several times, some six or eight times, I reckon, during a period of a couple of weeks, or something like that. During that time I made complaint to Dr. Garner about my back.
Dr. Nicolson and Dr. Fincher have treated me. Dr. Nicol-
145 son has given me medicine and treated me different ways. He has examined me. He began to treat me somewhere about the time that Dr. Garner released me. Dr. Fincher never treated me until here about four weeks ago when I had a spell of sickness. Those are the only doctors who have treated me since I left the hospital. Dr. Elkin examined me.

I am now working with the Atlantic Ice & Coal Company in Kirkwood, at their coal yard and ice box, at the Kirkwood stop on the North Decatur line, near Gen. Gordon's old home. I live on Douglas Street on the other side over in South Kirkwood, something like ten blocks from where I work. It is between a half and a mile, I don't know exactly how far. I walk it quite often, and often walk back at night.

Redirect examination:

When you push a car into a cut of cars and it couples, there is movement in them. I- will jerk the slack out of them. When the engine hit those cars I was on there wasn't any jerk of the slack.

Recross-examination:

These cars were standing on a down grade, but the brake down here might have been detached and then there might have been slack. Slack means when it has got play, works backwards and forwards. It is the play in the coupler. Slack can't run uphill,

and with those five cars I had the brakes set on the last car, when engine came back, and all the other four cars were laying down against that car. There couldn't be any slack in them that way.

146 I now weight 128 pounds. I weighed 132 pounds just before I got hurt, practically the same now. My color is good.

Dr. E. F. FINCHER, sworn for the Plaintiff, testified as follows:

Direct examination:

I am a practicing physician in East Atlanta. I have been practicing fourteen years. I know O. Y. Layton. I was called to him on the 5th of May. I reached him about 7:30 or 8 o'clock. He was nervous, in a nervous state, his respirations were accelerated and shortened and his pulse was rapid. I think it was about 115. The normal pulse is about seventy-two to seventy-five, and it was a very difficult matter to quiet down with sedative drugs. I remained with him about an hour or an hour and a half, hoping to get him to sleep, but I left him still awake and found him awake when I called on him the next morning and still with a shortness of breath. I administered veronal for a sedative, sleeping. I administered astrine and phenostim to relieve his suffering, and I administered bromides to quiet him. I had not treated him prior to that time. If he was knocked violently off a coal car, landing on his back and hurting it severely, in my opinion, there being no other apparent cause for the trouble, would think this trouble was very probably connected with the injury.

147 Cross-examination:

When I went out to see Mr. Layton I gave him veronal, astrine, pheonstim, caffeine and a bromide compound to quiet him. I was with him about an hour and a half that night. Veronal is used for sleeping, caffeine to relieve pain. It is a heart stimulant. I gave him one thing to put him to sleep and another thing to wake him up. Astrine is used to relieve pain. It is not especially a heart stimulant. It is pain relieving, like pheostim. He had no fever. He was just very nervous. He was rapidly breathing and his breath seemed about half shortened. That is some trouble with the lungs or the nerve centers. The nerve centers control the respiration and the lungs might do it, too. The lungs have a little bit to do with respiration. You breathe into the lungs and breathe out, too. Short breath was some trouble with the lungs. He was not cold nor congested. He didn't complain of colic.

Redirect examination:

In my opinion this disturbance was due to a disturbance of the nerve centers.

Recross-examination:

The nerve centers that control respiration—splanchnic nerve—I couldn't tell you where they are; they are up in the brain some-

where. They come direct from the brain, through the base of the skull there, they don't extend down and never get into the spinal cord. They don't go into the back. If this man had an in-
148 jury to his back it might affect these nerve centers. The nerves of the back enter the brain. The brain has been compared to a kind of telephone central and the affection of one may affect another, that is, in a reflex way. The nerves run in little cables just like a lot of telephone wires. I think through a reflex condition it is probable that an injury to a nerve of the back would affect the brain so that the nerve centers I found making this man breathe short might be affected, as it affects the general system. The reflex condition is a pair of nerves. So, if I touch this man it is telephoned to his brain and comes back here before he will feel it. If these nerves up here that affect respiration never get into the spinal column and there has never been any trouble with this gentleman's brain, but there is an alleged trouble in the back, the trouble in back can affect the nerve centers here in front that control respiration through the general connection of the whole nervous system through the main central point, that is as near as I can explain it. The spinal column holds the nerve cords and is made up of different pieces of bone that protect that. The nerves come out where those bones join, little holes that the nerve cables run out of and spread to different parts of the body. The nerves that control the respiration, the heart and the stomach, they all come out through the same sheath or cable. I don't know that I could say where it passes out; it comes out from the base of the brain, though, it does not enter the sheath of the spinal cord at all for its distribution. An injury to the back would
149 not affect the nerves of the heart or of the stomach or of the respiratory organs except as that might affect the general nervous condition.

The nerves that come out of the spinal column are distributed throughout the general system, out across the back, through the hips and down through the legs and around in front in the muscle wall, but into the stomach, and even through the chest wall—the intercostal nerve—everywhere as a matter of fact. If one of these nerves in the back was injured so it was dead, and there was an area in the back on both sides of the spinal column and the nerves in that area were affected so they were deadened, they would be deadened everywhere throughout the distribution of that nerve. Those same nerves come out in front in the general distribution. I can't tell you just exactly the amount of area involved. If they were in any such condition that he couldn't feel back here, that paralytic condition would have to extend around in front. If you cut that nerve you couldn't get any distribution after you left the cable.

Further examination by Mr. Smith:

If you cut off a man's foot, for example, that is apt to have an effect on the heart action at the time it is cut off. You could get some shock from it. That is a reflex effect. It might have an effect on his respiratory organs. That would be reflex.

I am a general practitioner, not a specialist in any line of work.

150 Further examination by Mr. Black:

This reflex action that I am talking about that affected the respiratory nerves, that might have been caused by any diseased condition, anything that disturbed the nerve centers might cause it. A diseased condition of the nerve centers here due to reflex action might have been a reflex action from any diseased condition of the heart.

Mrs. O. Y. LAYTON, sworn for the Plaintiff, testified as follows:

Direct examination:

I am O. Y. Layton's wife, have been married fourteen years. He never was sick a day since we were married until he was hurt. I saw his back while he was in the hospital, the next morning after he was hurt. There was a bruise on the lower part of his back and the right side of his right shoulder. He is restless the greater part through the night, sometimes it is midnight and afterwards before he ever goes to sleep, and what time he will sleep he is in a jerk all the time. His limbs and his arms and his body will twist and jerk and jump. He wakes through the night quite often jerking that way even when he is asleep. Before he was hurt he slept like a log. In the last two months I have noticed he is more restless and sleeps less and seems to jerk more through the night, more nervous that way, he seems to be a good deal worse in the last two months.

Dr. W. P. NICOLSON, sworn for the Plaintiff, testified as follows:

151 Direct examination:

My name is W. P. Nicolson. I am a physician. I have been engaged in the practice of medicine in Atlanta nearly thirty-six years. I was educated originally at the University of Virginia. I have been seeing Mr. Layton constantly as a patient for nearly two years. The last time I saw him was about ten days ago. I don't see him very often. I see him at intervals of probably two or three weeks. Mr. Layton, besides the loss of his right arm, has a great deal the matter with him. He has what is commonly known as a spinal injury, that is, he has an extremely tender condition of the back, so much so that if he is sitting on a seat, on a stool or a chair, and is given a slight touch with a pin he can't stay on that chair, no matter how much he tries, the muscles will put him off and make him drop on the floor, whether he wants to or not. Those muscles are just as badly contracted as they can be, worse on the right side. A person cannot feign that condition of the back, because you cannot hold any muscle contracted permanently, you are bound to know it, the muscle tires out, they only stay contracted from disease. It impairs a man dreadfully in my opinion. I don't believe he can possibly do heavy work. There is very little change in it in the two years I have been seeing him. He gets a little better, perhaps, a gradual change. As far as any heavy work is concerned, I think the future is very doubtful; of course, he may in some years get to where he can do a good deal, but at the rate he has been im-

152 proving it certainly has been gradual. That condition is painful to the patient. I think they have more or less constant pain in the back, I think, and nervousness. Those patients sleep very poorly, some scarcely at all, I have always been giving him things to try to make him sleep, but I don't know whether he sleeps or not.

Cross-examination:

That tender condition is all over his back, and especially in what we call the lumbar region generally, in the small of the back. I judge by the way the muscles behave. If he is sitting in a chair and you stick a pin in him he will jump out of it. Most people won't jump out of a chair and sit on the floor. They might jump up from a chair, but they wouldn't jump and sit on the floor. Anybody would jump more or less, but there is a different kind of jumping. Some folks are called goosey. I have seen a number of goosey people. Some are more goosey than others and a fellow who is real goosey, if you touch him right quick he will jump ten feet and holler, and sometimes you don't have to touch them, you can make a motion at them and they will jump. There is nothing the matter with such a person's back except he is goosey, a nervous condition, rather hard to define it exactly.

The muscles in this man's back are contracted just as tight as they can be every time I have ever seen him. I tell that by examining the back, by feeling the muscles and looking at them. All the muscles of his back are not contracted that way, just those
153 two muscles, the erector spinae muscles. There are thirty-six muscles in the back. The erector spinae muscles run down on each side of the spinal column. It is that group of muscles on each side that holds the spine up. There are five layers of muscles in the back. The erector spinae are in the deeper layers, you might say in the fifth layer. The muscle where it trminates, where it is attached to the bone, is spread out into a sheet that is not much thicker than a sheet of paper, what we call the tendon that joins the muscle, and there are several of them over the erector spinae muscles that make a strong sheath that holds them together. Those layers, counting the skin, are probably not over a quarter of an inch thick. You can see the shape of the muscles perfectly well, see them stand out. They stand out like a cord when they contract. They are voluntary in a sense; they are voluntary in that they all act together, but they are not voluntary in the sense that you can draw that finger down one at a time; they are not voluntary in that sense, they all act together. You can't contract one side and not the other. You might contract the back muscles, some of the superficial ones. The nerves on each side control them, of course; the nerves on one side of the body control the muscles on that side and the nerves on the other side of the body *onc*trol the muscles on that side. Those muscles in the back stay contracted from disease in a sense, an irritation of the nerves that supply them. There can be a constant irritation of the nerves, and you can illustrate that by the disease known as wry neck, where the neck is drawn down

154 this way (illustrating), and the muscle on this side becomes permanently contracted and stays in that position, and you never can put the neck back until you cut that muscle in two and get it back to its natural length. Muscles contract only through the influence of the nerve that goes into them. Every muscle has a nerve that goes into it. I think a nerve could stay irritated for as long as two years and wouldn't become paralyzed, sometimes much longer.

An injury such as I have described to a man's back would affect his general health, generally very bad. It is generally a part of the general condition I think of the nervous system. He can stay in that diseased condition without losing flesh. I don't think it would necessarily have any effect on his complexion. They usually get a tired expression, rather a worried expression of the face from it. I think a man could have this trouble with his back for two years and still not lose any flesh and not give his appearance any indication of that condition. I have seen as big a man as I am have it and have it for years. I have seen a great many men have it all their lives. Have never seen one of them completely recover from it.

I am not a crank about anything. I have very decided views on the subject, that have been forced on me from hundreds and hundreds of people that I have seen with it. I have seen them get better, a great deal better. This back condition I found is largely a nervous condition.

155 I don't know that the nerves in Mr. Layton's back are especially excitable or irritated, but we constantly see, when you have got nervous trouble, sometimes without injury, this tense excitability of the nerves of the back accompanying nervous trouble. You see it sometimes without injury, on account of spinal irritation. In Mr. Layton's back the muscles on each side of the spine, the erector spinae muscles, are pratically the only ones that stay rigid. The others contract very violently from a slight touch, just like you would put a pencil to them, but these muscles are the ones that stay more or less permanently contracted; just why I don't know. They just set up there as two round cords; when you press them with your finger it practically feels as hard as a piece of wood. If you stick pins in him somewhere else his muscles contract. When we touch him with a pin the whole side may shrink, but if you touch it with a pin, the muscle right under, just like you would put the pole of an electric battery to it, and that is not natural, that will not occur in a healthy muscle.

I think he has a group of symptoms commonly known as spinal concussion. I don't think that is the proper name for it, but that is what it has been called for a good many years. The nerves and muscles of his stomach are irritated to a certain extent. The nerves come off from the back and run right around to the front. They come at three places especially to the surface, one the back, one in the middle here and another towards the front. If you just

156 touch them you get contraction, but there is no chronic rigid condition. The muscles in his leg are not rigid. The nerves in the leg come from the spinal cord coming down through the

spinal column. I mean there are no nerves that come out of the little openings in the spinal column, go through the back and down into the legs, not to any extent, some go down around the hips, but not down to the legs lower. They come down inside of the spinal column until they get here to the hips, and then they break off and pass on down into the legs. The nerves in the back vary in size all the way from the size of a very small white thread to the sciatic nerve, which is larger than my little finger. The nerves of this man's back affected are just the ones that supply the different muscles there, they have no names to them. The nerves that go into the erector spinae muscle of Mr. Layton's back are about as big around as a piece of white sewing thread.

(The plaintiff stripped his back.)

You will notice now, there is what we call the sacro-iliac joint, and notice that muscle up there jerk, that jerks all by itself, no man can do his back that way. Now, to illustrate the effect of a light touch, I don't expect to touch him any more than a touch right there, but you see it makes him grunt every time. The grunting is due to this contraction of the abdomi-al muscles, too; while I don't want to be considered an extremist in everything, but there isn't a man who can do his leg that way, I don't care who he is;
157 he has got to do that, now, you see the instantaneous effect of just the slightest pressure, and if anybody doubts that being real——

That is what I mean by contraction, just as if you would give electricity to the muscle. In many cases, in his case, you will get a difference of fifteen or twenty beats in his pulse from simply doing that; his pulse is at ninety, I don't know whether it will increase any, but I will see. The muscle I speak of is the erector spinae, this group running up on either side here (indicating). His pulse is about one hundred.

(At the request of counsel, Dr. Elkin examined the plaintiff.)

158 Plaintiff rests.

Dr. W. S. Elkin, sworn for the defendants, testified as follows:

Direct examination:

My name is Dr. W. S. Elkin. I am a physician and surgeon and have been for more than thirty-three years. I graduated from the University of Pennsylvania, Medical Department, in the Spring of 1882, came direct to Atlanta after that and have been practicing here ever since. I do mostly surgical work now and have for the last ten years. I do some general practice, very little. I am Local Surgeon for the Georgia Railroad and have been since the death of Dr. Cooper about eight years ago. He was the Local Surgeon. I was a partner of Dr. Cooper prior to that time, about seventeen years altogether.

I examined O. Y. Layton on the 15th of January, 1915, in my office in the Candler Building. He came to my office for that pur-

pose. I stripped him, took off his coat and his shirt, and examined his back and his legs and his arms and his heart and lungs and pulse, and also examined a specimen of his urine. Don't think any fuller examination could have been made of him to ascertain his physical condition. I found his lungs normal, no trouble with them. His urine was normal. Made a chemical and microscopical examination of his urine and found nothing the matter with that. His heart is normal. The pulse was slightly accelerated, ninety at the time I
examined him. Normal pulse in a man varies from seventy
159 to eighty, sometimes it is a little over eighty. Excitement will
accelerate the pulse. Usually an examination brings it up. The pulse is the index of the heart. Any undue excitement will accelerate the pulse. There was nothing physically the matter with his heart that accelerated his pulse. His arm had been amputated. It was in very good condition. The stump looked healthy and it had healed up all right. An artificial arm could be attached to it.

I examined his back and found the muscles of the back normal, as far as I could tell. I didn't see anything wrong with them. I examined as far as I could the nerves of the back. I did this by pressure and observation. You can't see the nerves of the back. I saw nothing wrong with the condition of the nervous system there, no wrenched condition of the muscles and nerves that I could discover. There was no sprained condition of the muscles and the nerves of the back. There is such a thing as spinal concussion. It is an irritation of the spinal cord due to severe pressure and injuries. I did not find any indication of spinal concussion in this man's back.

The nerves that control the respiratory system comes from the brain. They do not come through the spinal column. If a man was sick and had short breathing an injury to the back might cause that, if expanding his lungs would cause any irritation to the nerve
that was involved. In my examination of Mr. Layton I did
160 not find any condition of his back which might possibly affect the nerves which control the respiratory system. I did not find anything the matter with Mr. Layton except the loss of his right arm. Otherwise he was entirely normal.

Another time I examined Mr. Layton, about the 12th of May. That time he was in Kirkwood near his residence, I went out to see him and he was not at home, and as I came out of the house I met him coming off the sidewalk into his house. I was asked by the officials of the road to go out and examine him.

At my second examination of Mr. Layton on May 12th I did not find any difference in his back at that time to what I found in it the first time. I did not find any rigid muscles, not any more than natural, nor any congested condition of the nerves of the back. I took his temperature and pulse and stripped him. His pulse and temperature were normal.

(Dr. Elkin examined Mr. Layton's back and Mr. Speer's back.)

Everybody has these erector spinæ muscles in a contracted condition and you can find them in most anybody. Of course the condition of a person depends more or less on how the muscles shown,

these muscles here on either side that are grouped just in the center, these are the muscles, if you will press your finger on them you will see they are hard and firm, just as I am doing there; there is more fat on this man than on the plaintiff, but you can feel those muscles all the time in a rigid condition; if a man will turn himself
161 a little to one side, you can throw those muscles out very easily voluntarily; you can contract those muscles or retract them, if you raise your arm, just as you see is done in this case; that muscle is hard, it is very hard, if you would like to feel it you can feel it; that returns in this way, that is loose, that muscle is loose then, but you can by raising your arm or shoulder contract that muscle and you can throw it out; it is naturally in a contracted condition, bound to be, because it has got to sustain the upper part of a man's body. He has got to be in an erect position and these muscles are supposed to be braced on either side of the backbone to hold it in position. I don't attach any importance to the rigidity of the muscle, because that is the function of it, to be strong and rigid to hold the backbone, and you can throw those muscles backward and forward in that position. I never saw this man's back before (indicating Mr. Speer). Now, in regard to the sensitiveness of the back, of course I don't say that this man may not have a pain in his back, I don't know, we can't see pain, we don't know anything about it, but at the same time a great many people are hypersensitive naturally; the prick of a pin here and there would naturally or could make a man flinch, or he could assume it just as easily as not; some people, you can stick a pin in them to the head and they won't jump; others you can't touch with a pin, whereas if there is irritation of the skin and muscles, hypersensitiveness, they will feel it quicker than otherwise. As to the contraction of the mus-
162 cles, these are the same muscles, that muscle isn't really any firmer than the muscle on the other side. The sacroiliac joint, as Dr. Nicolson said, is just where the sacrum and the end of the backbone comes to the pelvic bone; it is not connected openly at all really and if there is any injury to it, it is generally to its elasticity.

(The foregoing testimony was delivered by Dr. Elkin after stripping both the plaintiff and Mr. Speer before the jury.)

Cross-examination:

An artificial limb could be fastened on the stump of his right arm. I don't think they amount to very much. It just looks better. I think that Mr. Speer's back looked like Mr. Layton's back, as exhibited here before the jury. It didn't appear to have any more tenderness or rigidity of the muscles, if the amount of superficial fat and skin was the same; you can hardly compare two backs unless you get them where they weigh the same or had the same amount of skin and superficial fat; you take a man like the Judge there, his muscles wouldn't show at all, but you take this man and they stand out prominently. I think both backs are normal.

An abnormal condition of the back is indicated by several conditions. A back that had been broken, or a disarrangement of the vertebra, you could get a crooked or curved back; sometimes you get

a back that has been broken, maybe you get an absolute curve in the back, and you get very frequently in those cases what we call
163 a lateral curvature, the back will twist from one side to the other; that is not only due to the bone injury, but it is due to the nerve supply; in other words, if a man has a serious back injury, affecting the nerves that supply those muscles, those muscles don't develop, consequently there is an inequality in the development of those two muscles, just like there would be if you had an injury that involved the nerves that supply the muscles of the leg, that leg will get smaller than the other. As a matter of fact, these muscles in Mr. Layton's back are equally developed, although he complains more of pain on the right side than on the left, and more at the shoulder than any other part of the back. There is no lateral curvature there.

The general physical symptoms you expect to see if a man did have an injury of the nerves that supply those muscles might be a hypersensitive condition of the back. I couldn't swear that he did or did not. I do swear that he didn't have a curvature.

Assuming such an injury as would cause weakness and pain which at times is considerable and does disable him from getting around, that causes nervousness and works an impairment of his ability to sleep at night, at the time I examined him two years after he was hurt, I think if those symptoms did exist it would be a marked irritation of the muscles and back, which you could very easily tell by examination. You would see a very marked rigidity.

I saw no rigidity in Mr. Layton's back. I am unable to say
164 whether he is faking hypersensitiveness or not. In such a case he would have more or less symptoms in his lower extremities if he had a serious injury and a permanent injury to the spine—diminution probably in one of the legs finally, with reflection of the wall of the abdomen, reflex muscular arrangement. I don't believe you can have a severe injury to the nerves that supply back muscles unless you had this injury to the cord, then if you have the injury to the cord other muscles would be involved besides those in the small of the back. Therefore I look for symptoms that would result from an injury to the cord, and not finding any, I don't believe that the nerves that come out from the cord are injured. Mr. Layton may possibly be suffering pain from his back; it might be rheumatism or neuralgia, just like you can have in any part of the body. It is possible for him to be suffering with some amount of stiffness or weakness in his back. I didn't see any evidence of it at all. He is the best judge of that, if he is honest about it. He might suffer a reasonable length of time after his accident with pain in his back from his wrenched back, but I don't see why it should last two years. If those symptoms of pain, stiffness, weakness and sleeplessness have continued two years from the time he was hurt, it is reasonable to suppose that the injury did it. The real question of the diagnosis in this case is whether he has those pains he complains of and says he has. It is not exactly a question of whether you believe what he says or not, for I
165 can't reconcile his condition and symptoms with a case of serious spinal injury. I don't believe what he says about it.

Redirect examination:

I found nothing in either examination of Mr. Layton's back that would give him pain at this time. I saw the examination of this plaintiff's back made just now by Dr. Nicolson. There was nothing in that examination that I saw, the result of which I would determine was caused by any back injury. The spinal concussion alleged in this suit is a serious injury or shaking up of the nerve cells that compose the spinal cord. I do not think there is anything the matter with this man's spinal cord. I don't think the nerves of a man's muscle could stay irritated for two years without a serious trouble with the cord back of it. The nerve is carried in the cord. If there was trouble in the cord, that would make its appearance somewhere else, in the limbs or something like that. I have seen Mr. Layton here this morning, the color of his face, the color of his skin, his back, his general appearance, and there is nothing that indicates that he is in a congested condition at all.

Dr. J. R. GARNER, sworn for the defendants, testified as follows:

Direct examination:

My name is J. R. Garner. I am local surgeon here for the Atlanta Joint Terminals. When Mr. Layton was hurt he was carried to the Tabernacle Infirmary, now the Georgia Baptist Hospital, on
166 Luckie Street. I first saw him on the night of August 27th, 1913, at the hospital. He had received an injury resulting in his right hand being severely crushed and mangled and a few minor bruises, as though he had had a fall, and two or three slight scalp wounds on the head. By reason of the injuries to the right arm amputation was necessary; the flesh was torn also and there was no chance to keep it. I performed that amputation. I dismissed him on the 29th day of September, a little over a month after the date of his injury.

There were three slight scalp wounds, very insignificant. In two or three days they were healed. There was a bruised place on his back, just about the lower part of the right shoulder blade. That bruise lasted a few days. He left the hospital about the 12th or 13th of September, 1913, was there about two weeks. While there I examined his back. I found nothing wrong with the muscles of his back at all. There was no symptom or indication of any kind, as to whether the nerves and the muscles of the back were affected. He made no complaint of them at all. I examined them and found no injury to the back other than the slight bruise I have described. After he left the hospital he came to my office for treatment. I was then treating the amputated stump, that had not entirely healed up. It did heal properly during this time. My office was in the Candler Annex. While he was coming to my office for treatment he at no time made any complaint to me about his back.

Cross-examination:

167 I had the nurses at the hospital rub Mr. Layton's back with liniment. It is customary in hospitals to rub the backs

of all patients, whether injured or sick, once or twice a day, because lying on the back in the hospital beds, provided with a rubber sheet under them, it is hot, and it makes a patient more comfortable. I had Mr. Layton's back rubbed just as a routine, without any complaint of it on his part. I made a thorough examination at that time of the muscles and nerves of the back, because the man was sent to the hospital to be under my care for certain injuries, and it was my duty to find not only the injuries that were apparent, but any other injuries that he might have sustained. I examined the rest of his body, too, and all I found were the bruises on his back and shoulder.

It is possible for a man to sustain an injury to the muscles of his back that would simple be a slight contussion and pass away in a short time; it is not possible for a man to sustain an injury to the muscles and nerves of his back that would be permanent and enduring without there was more serious injury, for instance, to the spinal column or spinal cord. For instance, you could have a severe cut or laceration of a muscle that would show for itself, but there would be no injury to the muscle that was not a destructive injury, such as tearing it away, visible external things, there could be none that would be permanent without injury to the spinal cord or the spinal canal. I don't believe a man can sustain a wrench that will give him a permanently lame back without a visible
168 tearing of the muscles or without some injury to the spinal cord or spine. My opinion as to Mr. Layton's injury is based on an examination of Mr. Layton himself.

When he was brought to the hospital his hand was mangled very badly. His forearm, all except the very lower part, was apparently all right. It was necessary to take off nearly all of the forearm, because in all crushing injuries such as his hand received the tissues for some way up are always bruised more than they show just at the time, and if you don't go high enough to make your amputation in good healthy tissue, you are likely to have to go later and do another amputation. It would cause him pain in his arm and of course any man having a fall would naturally have some little pain and suffering, more or less, owing to how he fell. I suppose his arm gave him considerabie pain for the first four or five days; after that it began to subside. If a man loses a limb he is apt to have pain from that lost limb. That happens occasionally when the nerves that supply the fingers and the part that is complained of become involved in the scar tissue; we obviate that as far as possible by pulling down these nerves and cutting them off short so that they don't take part in the scar formation. They say it feels as if the hand was there and hurting. It is a subjective symptom.

No one else treated Mr. Layton for the railroads at that time. I had an assistant who saw him occasionally, Dr. Harper. He is not here now. I don't know where he is.

169 Redirect examination:

Dr. Harper is somewhere in the west, but just exactly where I couldn't tell you.

I found nothing the matter with Mr. Layton's nerves or the muscles *or* the spinal column, or his back.

W. K. SPEER, sworn for the Defendants, testified as follows:

Direct examination:

I am working for the Atlanta Joint Terminals as yard engineer. Have been with those Terminals fourteen years and have been an engineer nearly eleven years. I was engineer of the crew that Mr. Layton was working with on the night he was hurt. Had engine, worked at Hulsey Junction at night. We switched up incoming trains. The different cars in such trains are taken and put into the various tracks for other roads. That is what is called breaking up trains. We had a train that came in on the L. & N. Road. It was too heavy to pull all out at one time, so we took half of the train and were switching it up, and backed out with I don't know just how many cars, some going to the W. & A., some going to the Central, and some to different places to be delivered, and we went back then to get the rest of this train and Mr. Layton was hurt.

It was standing on track No. 8, transfer track; they received trains and also made deliver*ed* from that track. We would come in and couple up the train and pull it back to the top of the hill. The foreman, as the cars were pushed, would cut them off and they would roll down in the different tracks which run from the lead track. Every car that was cut off was supposed to have a switchman ride it down into these various tracks, sometimes they would go down further and couple up to the other cars that were standing there, other times they would stop them probably halfway between the cut of cars before they hit them. That was a gravity yard. These different switch tracks are connected by switches with the head. Every track is numbered. Whichever track the car is to go to, the foreman gives one of his switchm*a*n the number of the track and the switchman goes to the switch and throws it. Sometimes he rides it in and sometimes there is a switchman nearer the cars than he is who does so.

That is the sort of work we had been doing. It is called classification, putting them in the different tracks where they belong. After doing that work with part of the train we went back on number eight track to get the rest of it. Charlie Cravett was conductor or foreman of my crew. He is dead now. There were on track 8 between my engine and the rest of the train down there five cars; loaded with coal. There was one stock car coupled in front of my engine in the direction I was going. I went in there for the purpose of coupling up and pulling the cars out and working them. I did not know where Mr. Layton was. When my engine came down No. 8 track on this movement at the time we made this coupling, I suppose the engine was moving between a mile and three miles an hour, not I should say over a mile—very slow. It was right after that that Mr. Layton got hurt. I don't know whether the car attached to my engine at that time coupled to the five coal cars or not.

After Mr. Layton was hurt he was carried away in the ambulance that came after him. We then continued our switching and made another coupling movement with this same car attached to the engine. It coupled without any trouble to the five coal cars, then pulled them out and finished the work.

In those switch movements in the yard the engine and the cars do not always couple when you come back to make coupling. Sometimes they fail. That is a usual occurrence there, day in and day out. Sometimes the knuckle is closed or is not open properly, probably both of them are not open, and that is the duty of the switchman, to see that those knuckles are open; they work automatically. If the coupler isn't open properly, the coupling won't make. As to soft or hard couplings, sometimes you have to hit them different, sometimes you have to hit them hard, and sometimes a light coupling will make them. After putting all the cars on the transfer track that are to go to a certain railroad, it is the switchman's duty to see whether they are all coupled together. He goes up and down the train or out of cars and if they are not coupled we couple up so we can pull them out and make the delivery.

170½ Cross-examination:

I am the gentleman whose back was examined here yesterday by the doctors. I have a good healthy back.

Whether you hit cars in coupling them hard or light depends on conditions; if the cars are on a gravity curve, of course we hit them light, if they are on a straight track we hit them hard. You have got to use judgment in it. Don't ordinarily hit them hard enough to knock a man down who is standing on top of them when he is braced.

An engine running a mile and a half an hour can be brought to a standstill instantly. When you have got a string of cars down a track to get, some of them two or three car lengths apart, you push them down, make the first coupling and slow down for the second one.

None of the cars got broken during this occurrence when Mr. Layton got hurt. If we have a car that is broken, they couple up to it and we carry it to the repair track, which is some distance, something like half a mile away from where we were. We didn't carry any of those cars to the repair track. We switched up the remainder of the train. When I hit those cars and didn't couple they rolled down and hit the next cut down there standing below Pearl Street. Nothing happened to my engine. We stopped at once, as soon as the cars didn't couple; we worked up to the
171 car just as easy as we could; when they didn't couple we stopped.

You can stop an engine in half a car length moving at fifteen miles an hour. Had Westinghouse air brake on my engine, and they were working perfectly. We stopped instantly, without running half a car length, didn't run any distance at all, because the cars didn't couple. I can't say why they didn't; that's up to the switchman. I am familiar with the railroad business. That auto-

matic couplers work sometimes and don't work other times is no indication that anything is the matter with them, but I can't explain that because I have never had any experience with drawheads at all. Sometimes when you hit them too hard it might cause it.

Mr. Matthews was our car inspector who inspected those cars. He is not the man they call Rags.

Redirect examination:

At the time Mr. Layton was hurt I was moving on the lantern signals of the switchman. There was nothing unusual at the time I went to couple either as to the speed or stopping. It was just as we had been in the custom of doing all the time.

DOL ASBURY, (*c*) sworn for the defendants, testified as follows:

Direct examination:

I work for the Georgia Road Joint Terminals and was a fireman there on Mr. Speer's engine at the time Mr. Layton got hurt.
172 We were breaking up an L. & N. train; had moved a part of that train and come back for the balance with a stock car in front of the engine. We went down there on No. 8 to couple up to them other coal cars that we had kicked back down in there. They did not couple. My duties were confined to firing engine. Mr. Speer, the engineer, was operating the engine. We were going down there slow. After Mr. Layton was hurt and was taken away we made this coupling and finished breaking up this train.

Cross-examination:

I did not see Mr. Layton get hurt. Afterwards I went down there, I was the first one got to him. He was sitting down there at the edge of the ties. I didn't see no end sill broke at all about it. I am sure of that. I could lean my head out of the window and see down the side of that box car ahead of the engine. The signals were given on the engineer's side. I couldn't see them. I do not know why those cars did not couple.

W. L. CHEEVES, sworn for the defendants, testified as follows:

Direct examination:

I am now working for the Atlanta Joint Terminals as a switchman and was at the time Layton got hurt. Just prior to the time he got hurt I was standing on Pearl Street crossing on track No. 2 with Mr. Gravett, conductor of our crew. There was an electric light there at that time at the crossing. I was not the switchman giving signals for the movement of that train on No. 3 track
173 at that time, I didn't see the engine when it came in that track, nor when they attempted to couple. Afterwards I saw the five coal cars in motion.

I saw Mr. Layton on those coal cars. He was standing on the edge of the coal car when I saw him, with one foot up in the coal

and the other was kind of on the side of it, standing right up on the end of the coal car, though. I couldn't tell from where I was whether his foot was on the edge of the coal car or on the coal at the edge. Those cars had to roll about a couple of car lengths before he got hurt. He was either on the east end of the fifth coal car or the west end of the fourth one. West is towards the depot. This happened in the night time. The only light to see by was that street light there and our lanterns. He was standing on the last car towards the depot or on the one next to that. I saw him when he fell. Mr. Gravett hollered at him, is why I looked, and I saw the cars hit and saw Mr. Layton go over. He was standing just before he went over as I have just described him, right on the edge of the car.

Cross-examination:

I never heard Mr. Gravett tell Mr. Layton to go and let off those brakes.

Mr. Layton went down to track eight. Mr. Gravett and myself went down to No. 2 track to cut some hose. I couldn't tell exactly the distance it was from Pearl Street, about fifteen car lengths.
174 Between track 2 and track 8 there were tracks 3, 4, 5, 6 and 7. When Mr. Layton got hurt I was standing on Pearl Street crossing, me and Mr. Gravett, talking. I couldn't say exactly how long it took me to go down track 2. Mr. Gravett went down there and he told them to shove No. 8 track. That is, we always go down and tie down a part of the track, and when we begin to get full we shove the cars down together and couple them up. When we have a coupling to make we stop and make the coupling, and then we shove down there, if there is another coupling we make that coupling. I didn't catch that whole cut of cars and put brakes on it to keep it from running off the lower end of the track. I never did get on the cars at all.

J. R. TURNER, sworn for the defendants, testified as follows:

Direct examination:

I have been working for the Atlanta Joint Terminals for sixteen years. Am now general night yard master and have been for about nine years. The practice and custom out there in the yards relative to incoming trains is, when a freight train pulls into the yard it is always inspected by inspectors, then after the conductor leaves the bills at the yard office tags are made up by the chief yard clerk, and a tag boy takes these tags out and tacks a tag on each car, showing the road that every car goes to. They are all tagged to connecting lines, and our siding, and to the freight house, different places; then when that train is tagged and inspected, we have an
175 engine in a certain place in the yard, what we call a break-up yard. That means switch them up, classify them, switch them to the different tracks. All cars that are switched in this break-up yard are cut loose and ridden to the different tracks by the men that ride them. We usually work from three to four switchmen and a foreman on those crews. They are cut loose, signals are

given by a foreman as to what track they should go, and the men ride them down and set up brakes on them, and then they come back and get other cars as cut loose; just a continual switching there all night. The practice and custom in the yard relative to the speed of a switch engine in making couplings generally, is to make them about six to eight miles an hour. There is a difference between making a coupling uphill and one downhill. The uphill speed would be a little slower speed than the downhill. Sometimes they will couple by these switchmen riding them down. They usually set the knuckle for them to couple, and sometimes they will couple and sometimes they don't couple; sometimes the drawheads will miss one another, where there is so much play in them; sometimes the lock pin will fail to drop. It is not a usual thing for them to couple every time; sometimes they couple and sometimes they don't. It is more apt to couple by more speed; the harder it hits, the more apt it is to couple. The practice and custom out there in the yard is, switchmen are obliged to know and to look out as to
176 whether cars couple or do not couple, that is their business.

After these trains are switched up there is no inspection made of these cars until they get ready to make the transfer delivery to the connecting lines. Then they go in on the track with an engine, the switchman goes down and couples the air hose and makes the coupling. If there is anything to couple they couple it up so as to make a complete train.

Two of the switchmen who were with Mr. Layton, a Mr. Hogg and a Mr. Dodgen, are not now in our employ.

Cross-examination:

I am not in charge of the routing of cars. It is the foreman's duty to know in what tracks the different cars belong in breaking up a train. He switches by those tags that are tacked on the cars by a tag boy. The chief clerk makes out the tags from the waybill. They keep them at the yard office there until they make out the bills for those cars to where they should go, and then they all come to the depot, the freight office. I do not know whether they have the waybills for those cars on which Mr. Layton was hurt at the depot. That is in the agent's department.

I was not on duty the night Mr. Layton got hurt. I was on in the daytime then. I don't know anything about that particular case.

177 J. C. Matthews, sworn for the defendants, testified as follows:

Direct examination:

I am employed by the Terminals now and was at the time Mr. Layton got hurt. After Mr. Layton was hurt I inspected the car he was hurt on. It was an L. & N. coal car.

Defendants offered in evidence the four pay checks identified by the plaintiff, as follows:

July 14, 1913, June wages	$50.32
Aug. 14, 1913, July wages	42.38
June 14, 1913, May wages	37.74
Nov. 24, 1913, August wages	76.14

Defendants rest.

Plaintiff offered in evidence the mortality and annuity tables.

ARTHUR DODGEN, sworn for the plaintiff in rebuttal, testified as follows:

Direct examination:

I am now farming up at Smyrna. I was one of the switching crew of the Joint Terminals with which Mr. Layton was working the night he was hurt. I didn't see Mr. Layton start down towards track 8, but I heard Gravett, the foreman, tell him to go, and Mr. Layton went one way and I went the other. I went towards the engine. He told him to go and knock the brakes off the five head cars on
178 the head end of No. 8. He told me to take the engine and go around the lead and head in on No. 8 and pick up a car, which I did. Of the two cars we were to couple the knuckle on the car that was coupled to the engine that I was riding was open. I couldn't state for sure whether the other one was or not. When the engine hit they didn't couple because the drawhead mismatched. Then the cars that I was trying to couple to rolled on down the track. The engine and the car it was pushing came to a stop when they hit the cars. I signed the engine down when I saw they were going to miss. I do not know anything about any car being taken out of that cut and put on the repair track. I saw Mr. Matthews, an inspector, inspect those cars that night.

I was directing the engine back, was giving the engineer signals.

Cross-examination:

We were breaking up an L. & N. train, switching cars into the several tracks into which they should go. The five coal cars that were standing on the head end were going to the Central Road. We put all Central on No. 8. That train was too heavy to move all of it the first time, so we first moved about half and were coming back after the balance at the time Mr. Layton was hurt. The engine was headed in on track No. 8 to couple to those coal cars on head end of the track. There were these five coal cars, then there was the balance of the train on down towards the depot, standing
179 below Pearl Street. I was signalling the engineer ahead to couple to those coal cars. He was headed in there. We had an empty stock car coupled in front of the engine and I was standing nearly on the corner down there. The knuckle of coupler on the stock car was open; I won't say I opened it, it was done in cutting the other cars loose. I don't know whether the coupler on the coal car I was going to couple to was open or not. The engine was moving under my signals and when cars failed to couple, the engineer was signalled and he stopped in-

mediately. The five coal cars rolled down and struck the remainder of that L. & N. train on track no 8. I saw Layton's lamp ahead. He was on the fourth car from where I was.

The engineer was moving under my signals. He stopped when I gave him the signals.

In a movement of this kind the cars often fail to couple, for different reasons. Sometimes the drawbars may mismatch and sometimes in one coupler or the other the knuckle may not be open. Sometimes the pins interfere with the coupling, or a curve in the track. A switchman working down there knows all that. If he has worked down there long enough he will find it out. Switchmen are obliged to know that sometimes they couple and sometimes they don't and the only way he can protect himself is to look out for that all the time, be on guard against whether they couple or whether they don't couple. After Layton was carried away
180 I continued at work there with the crew, subsequently made a coupling with these two same cars and hauled the train off.

Redirect examination:

I did not see the coupling made. I gave the engineer a stop signal. When we went down to *d*ouple to the cars, before I would let him hit them hard, just as they coupled, I gave him the stop signal, and then the cars rolled off and I signalled him ahead, and we rolled on down there after them to couple them again, but before we hit them the next time with the engine I saw Mr. Layton's lamp was off the car, and I signed him down then, and that was the time he stopped.

Recross-examination:

After giving engineer the second stop signal he rolled about half a car length. He stopped immediately when I gave him the first one; that is, he stopped when he hit the cars and I gave him a stop signal because he hadn't made the coupling. Then I signalled him ahead again so as to try and make the coupling. Then when I saw Mr. Layton's light go out I signalled him down again and he stopped in half a car length, never did hit them the second time.

E. L. Hogg, sworn for the plaintiff in rebuttal, testified as follows:

Direct examination:

I was one of the crew at the Atlanta Joint Terminals with Mr. Layton the night he was hurt. I saw him get hurt. At the
181 time he was knocked off the car I was standing at Pearl Street crossing. Mr. Cheeves and Mr. Gravett had gone down to the train to mark it up. I seen the cars when they hit and seen them when they knocked Mr. Layton off, that is, when they hit down below. When the engineer went to couple them missed the coupling that time. I couldn't say whether he hit a hard lick or a light one, because I wasn't up there. Mr. Dodgen coupled the engine. It broke the end sill of an L. & N. car when they hit. The

coupler runs under the end sill. It helps hold the drawhead up. I saw a car inspector inspect that car with the busted end sill. They called him Rags. I don't know what his name is. I don't know whether he works there or not. That car was bad, ordered sent to the rip shop right behind the shop.

Cross-examination:

I saw the damaged end sill on this car myself. It was an L. & N. car, the rear car, the one that hit below the crossing. When they hit them cars below the crossing it was the one that hit the cars down there. I think there was five, I am not certain. The engine had one stock car in front of it and was coming down towards the depot. The car that was broken was the last car towards the depot in the cut of five coal cars. That wasn't broken when the engine went to make the coupling because there was nothing up there to break it against. It broke when the cars came down and hit against the rest of the standing train. I had nothing to do with
182 this last movement into No. 8 track at the time Mr. Layton was hurt. I didn't give any signals.

Plaintiff closed.

J. C. MATTHEWS, recalled for the defendants in rebuttal, testified as follows:

At the time Mr. Layton was hurt I was car inspector. I know Mr. Veal, another car inspector. I work on one side and he on the other side of the yard. We inspect them going out on one side and inspect them coming in on the other side. Mr. Veal worked on the going out side. I was inspector on the coming in side. On track No. 8 there were cars that were switched out there for connections. It would have been the duty of either one of us to inspect them, that is, if Mr. Veal wasn't busy on the other side of the yard at that time, and I was busy, it was his duty as much as mine. We haven't any record of Mr. Veal inspecting any cars on No. 8 after Mr. Layton got hurt. After Mr. Layton was hurt I was due to inspect the entire cut of cars for all defects, to see whether the cars were damaged to any extent or not, and I examined that entire cut. Did not find any damaged end sill in any car in that cut.

I made a special examination of couplings of the one car Mr. Layton was on. After that time I made a general inspection of the whole cut of cars and did not find any damaged car in that cut. No car of that cut was taken out and tagged as bad order
183 and put on the repair track. I was due to do it if there was any needed shopping at that time. I did not shop any of them. I kept a record of what I did that night. We don't take the initial or number of every car we examine, only the damaged cars. I have a record of all damaged cars described by the initial and number, and you show what their defects are. I have that record with me.

Mr. Veal still works in the yard. He has a similar record of what he did that night. When he wasn't busy at his end he was due to

COPY BOUND CLO

help me out. When on the stand before I swore that car that Mr. Layton was hurt on was the only car I made a record of. I didn't swear that was the only car I examined that night. Afterwards, in the course of an hour, as I had time to go over the rest of the cars, I inspected them. I remember examining all of them. I inspected the entire cars, from the rails to the top of them. Mr. Veal examined the outgoing trains and helps me on the incoming trains. This train had been inspected after it came in. It was not outgoing. It appeared some damage might have been done; our duty is to go through and see whether any damage is done. There was a man hurt on them, that is the reason I went over them again.

M. F. Veal, sworn for the defendants in rebuttal, testified as follows:

Direct examination:

184 My name is Millard Franklin Veal. I work at night now for the Terminals—car inspecting. I was working for the same Terminals at the time Mr. Layton was hurt, was at work there that night. My regular job at that time was getting out the L. & N. trains, outbound trains, but I helped on the incoming trains. At the time Mr. Layton was hurt they were "breaking up" a train on Track No. 8, putting the cars in the different tracks. I was at Pearl Street Crossing, at the watchman's shack. I don't have any recollection of making an inspection of the cut of cars on track No. 8 that night, nor of finding any damaged cars in that cut, nor marking any car in that cut in bad order and tagging it for the repair track.

Cross-examination:

When Mr. Layton was hurt I went to him. I can't say how many cars were there at that time. The yard was full of them. It has been a good long time ago. It is pretty hard to remember, without your records, just what cars are in bad order in the yards. I haven't looked at that record. When Layton was hurt I wasn't doing anything, was sitting down at Pearl Street. I don't recall that the end sill of one of those cars in that cut had been broken, I am not positive about that. I don't know whether I know Mr. Dodgen or not. I know Mr. Hogg. (Mr. Dodgen entered the court room). Now that I see him I remember his face. I have forgotten his name. I don't remember telling Mr. Dodgen that there was an end sill busted on one of the cars in that cut. It seems like I remember seeing Mr. Hogg
185 that night. I do not remember telling Mr. Hogg that night that there was an end sill busted on one of those cars.

Redirect examination:

I have no recollection of any end sill being broken, nor of any such conversation with either Mr. Dodgen or Mr. Hogg.

A. Dodgen, recalled for the plaintiff.

I saw Mr. Veal that night. He did not make any statement to me

SE IN CENTER

about the car being damaged. I did not hear him make any statement on that subject to Mr. Hogg.

We agreed that the foregoing brief of the evidence is a true and correct brief of the evidence in this case of O. Y. Layton vs. The Atlantic Coast Line Railroad Company et al.

This August 30th, 1915.

MARION SMITH, *Att'y for Pl'ff.*
DORSEY, BREWSTER, HOWELL AND HEYMAN,
TYE, PEEPLES AND JORDAN,
McDANIEL AND BLACK,
Att'ys for Def'ts.

The foregoing brief of evidence in this case of O. Y. Layton vs. Atlantic Coast Line Railroad Co. is approved as true and correct August 30th, 1915.

W. D. ELLIS,
Judge S. C. A. C.

Filed in office this the 30th day of August, 1915. J. C. Lewis, D. Cl'k.

186 STATE OF GEORGIA,
County of Fulton:

I hereby certify, That the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the Supreme Court in the case of Louisville & Nashville R. R. Co., et al., plaintiff- in error vs. O. Y. Layton, defendant in error.

Witness my signature and the seal of Court affixed this the 11 day of September, 1915.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

187 65. Atlanta.

Supreme Court of Georgia.

ATLANTA, September 23, 1916.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

LOUISVILLE & NASHVILLE R. Co. et al.
v.
O. Y. LAYTON.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is con-

COPY BOUND CLO

sidered and adjudged that the judgment of the court below be affirmed. All the Justices concur except Gilbert, J., not presiding.

188 65. Atlanta, October Term, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al.

v.

LAYTON.

Per *Curiam:*

O. Y. Layton instituted an action for damages for personal injuries against several companies operating their railroad-yard under the name of the Atlanta Joint Terminals, by whom he was employed. The petition contained two counts, which were substantially the same except that the second was brought under the Federal employers' liability act, whereas the first was brought under the State law. It was alleged, that in the course of his duties the plaintiff went upon "a cut of cars" in the yard of the defendants, to release the brakes of the cars, so that a certain switch-engine might couple thereto and remove them to another track. When all but one had been released, the engine approached and struck the cars a violent, unusual, and unnecessary blow, and they failed to couple by impact, and ran down the track, striking against other cars standing thereon. The concussion upon striking against the other cars caused the plaintiff to be thrown from the car on which he was working, and seriously injured. Other allegations were, that the defendants were negligent. (*a*) In not having the cars and engine equipped with automatic couplers which would couple with each other by impact; (*b*) in allowing the engine to strike the cars a violent, unusual and unnecessary blow when it attempted to couple them; (*c*) in not having the engine equipped with a power driving-wheel brake;
189 and that each and all of the above mentioned acts of negligence contributed to and caused the injuries. On the trial a verdict was rendered for the plaintiff on the first count. The exception is to the judgment overruling demurrers to the petition, and to the refusal to grant a new trial. Held:

1. The assignments of error on the judgment overruling the demurrers are not mentioned in the brief of counsel for the plaintiffs in error, and will be regarded as abandoned.

2. Evidence that plaintiff was injured in the switching yards of the defendants in the city of Atlanta by an engine and cars of the defendants, which he was engaged in operating for them, will support a verdict for the plaintiff, where otherwise authorized, under the first count, without evidence showing affirmatively that the parties were not engaged in interstate commerce at the time of the injury.

3. The safety-appliance act of March 2, 1893 (27 Stat. 531, c. 193), as amended by the act of March 3, 1903 (32 Stat. 943, c. 976), imposes a duty on every common carrier engaged in interstate commerce by railroad to equip its cars with brakes, etc., as therein provided; and this demand of the statute applies to the cars of such interstate carrier engaged in transporting intrastate freight. South-

SE IN CENTER

ern Ry. Co. v. U. S. 222 U. S. 20 (32 Sup. Ct. 2, 56 L. ed. 72); So. Ry. Co. v. Indiana R. Com., 236 U. S, 439 (35 Sup. Ct. 304, 59 L. ed. 661).

189½ 4. The design of the statute is for the protection of employees of an interstate carrier engaged in the operation of its cars, whether such cars are transporting intrastate or interstate freight. A brakeman whose duty it is to assist in the coupling of cars comes within its protection; and if such brakeman is injured in the discharge of his duties connected with making up trains, which is accomplished by the coupling or uncoupling of cars, and his injury is due to the fact that the cars were not equipped as required by the statute, in the absence of other facts discharging liability, the plaintiff may recover for such injuries. This case differs in facts from St. Louis & San Francisco R. Co. v. Conarty, 238 U. S. 243 (35 Sup. Ct. 785, 59 L. ed. 1290).

5. The charges on assumption of risk and contributory negligence, to which exception is taken, did not prejudicially deny the defendants any right connected with the proper presentation of their defense to the plaintiff's action.

6. The evidence supports the verdict, and no reason appears for the grant of a new trial.

Judgment affirmed. All the Justices concur except Gilbert, J., not presiding.

190 Supreme Court of the State of Georgia.

Clerk's Office, Atlanta, Georgia, this Fourth Day of December, 1916.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, citations and acknowledgment of service, together with the true and complete transcript of those parts of the record in the case of Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, Lessees of Georgia Railroad & Banking Company, Atlanta & West Point Railroad Company and Louisville & Nashville Railroad Company against O. Y. Layton, which are required by the præcipe of the plaintiffs in error to be sent to the Supreme Court of the United States, as appears from the records and files in this office.

Witness my signature and the seal of the Supreme Court of Georgia hereto affixed, the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endorsed on cover: File No. 25,670. Georgia Supreme Court Term No. 840. Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company, lessees of Georgia Railroad and Banking Company, et al., plaintiffs in error, vs. O. Y. Layton. Filed January 2, 1917. File No. 25,670.

In the Supreme Court of the United States

OCTOBER TERM, 1916

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, LESSEES OF GEORGIA RAILROAD and BANKING COMPANY, ET AL.,
Plaintiffs in Error,

vs.

O. Y. LAYTON,
Defendant in Error.

No. 840

MOTION TO DISMISS WRIT OF ERROR

The above named Defendant in Error respectfully moves the Court to dismiss the writ of error in this case for lack of jurisdiction.

The case is a suit for personal injuries to a Railroad employee, in which a recovery was had under a count based upon the Employer Liability Act of the State of Georgia. The present Plaintiffs in Error attempt to present a Federal question under the Federal Employers Liability Act, and another Federal question under the Federal Safety Appliance Act.

As to the first Federal question, the record shows that no such question was properly raised in the State Courts;

that the State law is more favorable to the defendants than the Federal law, and the question, therefore, frivolous; and that the contention that the State law did not apply is frivolous.

As to the second alleged Federal question, the record shows that in fact no Federal question but a question of State law is involved; that no right under the Federal statute was specifically set up; and that if the alleged Federal question had in fact been involved in the case, the contentions of the Plaintiffs in Error with respect thereto are too frivolous to support a writ of error.

All of the assignments of error relate to these two points.

The facts in the record are fully analyzed in the accompanying brief, and a statement with reference thereto is not repeated in this motion.

The Defendant in Error respectfully shows that for the reasons set out in the accompanying brief this writ of error should be dismissed. The Defendant in Error further shows that if the Court should disagree with this contention, the case is of such a character that it should be assigned to the summary docket under the sixth sub-division of the sixth rule of this Court.

Respectfully submitted,

Marvin Smith

Attorney for Defendant in Error.

GEORGIA,

FULTON COUNTY.

In person appeared Marion Smith, who on oath says that he is Attorney for the Defendant in Error, and that the facts stated in the foregoing motion are true as he verily believes. Deponent further says that notice of the time of submission of said motion and a copy of said motion, and of the accompanying brief, have been served upon counsel for the Plaintiffs in Error.

Marion Smith

Sworn to and subscribed

before me, this the 13

day of February, 1917.

Mrs. M. L. Beattie

Notary Public, Fulton County, Georgia.

BRIEF IN SUPPORT OF MOTION.

ALLEGED FEDERAL QUESTION BASED ON FEDERAL EMPLOYERS LIABILITY ACT.

The suit was in two counts, the first based on the State Employers Liability Act and the second based on the Federal Employers Liability Act. The verdict is based on the first count, that is, upon the State law, and is so specified in the verdict. Since the jury denied a verdict on the Federal law, the second count may be eliminated from a consideration of this case.

The defendants did not plead as a defence to the first count that the Federal statute applied, neither did they request any instruction on this point. In their motion for a new trial, they excepted to the instructions which submitted the first count to the jury upon the ground that the evidence demanded a finding that the plaintiff was employed in interstate commerce, and, therefore, that the Federal law applied. The defendants, however, in their motion for a new trial excepted to the instructions which submitted the second count to the jury upon the ground asserted in this part of their motion that the evidence demanded a finding that the plaintiff was engaged in intra state commerce, and, therefore, that the Federal Act as a matter of law did not apply. There would be abundant ground for arguing to this Court that such an attitude does not amount to specifically setting up a claim of right or immunity under the Federal statute, which must, in the language of this court, be asserted "unmistakably". It is unnecessary to consider this, however, because for another reason this assignment of error will not support a writ of error, which reason is supported by decisions of this court which are absolutely conclusive.

The State law, under which a recovery was had, is identical with the Federal law on the subject, except in one respect, and in that one respect the State law is more favorable to the defendants than the Federal Act.

This one respect relates to the effect of contributory negligence. Under the Federal statute contributory negligence can never amount to more than reducing damages. Under the State statute it always has at least this effect,

and may, when it amounts to a lack of ordinary care, entirely prohibit a recovery. A mere quotation of the State statute makes this perfectly clear. *Section* 2782 *of the Code of* 1912 is as follows:

> "Injury by co-employee. Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, or child, or children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment; Provided, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death, or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence. The measure of damage in case the injury results in death of the employee shall be that prescribed in sections 4424 and 4425: Provided, that the party or parties for whose benefit recovery may be had under this and the five succeeding sections may sue and recover in their own name or names in the manner prescribed by section 4424, in case no administrator or executor has been appointed at the time suit is filed. In case death results from injury to the employee, the employer shall be liable unless it make it appear that it, its agents, and employees have exercised all ordinary and reasonable care and dili-

> gence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company."

Where contributory negligence amounts to a failure to exercise ordinary care, or where the plaintiff could have avoided the consequences of the defendant's negligence, by the exercise of ordinary care, then under the Georgia law there can be no recovery, which is more favorable to the defendants than the Federal statute.

Where contributory negligence is not so great as to totally bar a recovery, the general rule of the Georgia law relative to actions of this character requires an apportionment of damages, which is in effect exactly the same as the Federal statute. The Georgia statute on apportioning damages under such circumstances is section 2781 of the Civil Code, and is as follows:

> "No person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover but the damages should be diminished by the jury in proportion to the amount of default attributable to him."

It is, therefore, perfectly apparent that under no circumstances could the Georgial law be less favorable to the defendants than the Federal statute, and under some circumstances it might be more favorable, from which it follows that the present assignment of error is without merit.

Chicago & North Western Railway Co. vs. Gray, 237 U. S. 399.

Under similar circumstances this Court has held that such an assignment is too frivolous to support a writ of error.

Kansas City Railway Co. vs. McAdow, 240 U. S. 51.

These two cases foreclose the present question.

It is observed, however, that no point in this respect was raised, as required by the Georgia procedure, in which State it is held that a Railroad must plead that the Federal Statute applies if it wishes to avail itself of this statute as a defence to a count based on the State law. *L. & N. Railroad Co. vs. Barrett*, 143 Ga. 742.

The assignment is further frivolous because under the proof in this case, the Court could not properly have applied the Federal statute. Briefly the proof was that the defendants were carriers of interstate commerce, but it did not appear that the plaintiff was employed in interstate commerce, the proof being entirely silent as to the character of the commerce in which he was employed. In the absence of proof as to his employment in interstate commerce, it would have been error to apply that statute. This seems to have been assumed by this Court as a matter of course in *Minneapolis, St. Paul, etc. Railroad vs. Popplar*, 237 U. S. 369. In the course of the opinion, the Court says:

> "In the present case a Federal question could arise only under the Safety Appliance Act; while the cars were upon a railroad which was a highway of interstate commerce, and hence this Act was applicable, it

is agreed that there was no evidence that the decedent at the time of the accident was engaged in interstate commerce, and no question is presented under the Employers Liability Act."

What the Court assumes, as a matter of course, is the exact proposition denied by opposing counsel.

ALLEGED FEDERAL QUESTION BASED ON FEDERAL SAFETY APPLIANCE ACT.

An analysis of the question asserted under the Federal Safety Appliance Act as a ground for the writ of error, will disclose the following:

I.

That no Federal question under this Act is in fact involved in the present case, and that the so called Federal question is in fact a question of State law.

2.

That the defendant did not specifically set up any claim to a right, privilege or immunity under the Safety Appliance statute.

3.

That the alleged question, if a Federal question, and it in fact presented as required by the Federal law, is too frivolous to support a writ of error.

The second count (based on the Federal Employers Liability Act) is eliminated, because the verdict is predicated on the first count, based on the State law. In this first

count, the plaintiff alleged several acts of negligence. The only one of these acts which in any way relate to the Federal Safety Appliance statute is the allegation that the defendants were negligent in that the engine and cars were not equipped with automatic couplers, which would couple by impact. The defendants pleadings do not in any way refer to the Safety Appliance Act. The defendants submitted no request for instructions presenting any theory of the Safety Appliance Act, and in the motion for a new trial and in the bill of exceptions to the Supreme Court of Georgia, and in the assignments of error in this Court the defendants have nowhere assigned error on any ruling which related to the charge of negligence on their part in the violation of the Safety Appliance statute. So that inso-far as the Safety Appliance Act is made the foundation of one of the charges of actionable negligence, there is no question presented to this Court, nor has any question ever been presented to either of the State courts through which this case has passed. This phase of the matter may be entirely dismissed with the foregoing statement. The indirect way in which the defendants have sought to make a point relative to the Federal Safety Appliance Act in this Court arises out of the following provisions of the Georgia law, and the following procedure in the trial court.

Code section 2783 and 2784 of the Georgia Civil Code provide that an employee of a Railroad Company shall not be held to be guilty of contributory negligence or to have assumed the risk of injury "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury". In charging the jury on the first count, the Court instructed the jury that the

count was brought under the statute of this State known as the "Employers Liability Act of the State of Georgia." The Court instructed them that this Georgia statute prohibited the defence of contributory negligence, and the defence of assumption of risk "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury." (Transcript of the record, pages 53-54.) After the verdict was rendered, the defendants excepted to this charge, and these exceptions furnish the only basis for an assignment of error which even indirectly is connected with the Federal Safety Appliance Act.

It is important to note, in this connection that there is no question about the fact that the Safety Appliance Act was violated. The assignments of error in this Court do not contest the fact that this Act was violated. The proof is clear that the automatic couplers did not couple by impact, and that the failure to couple was the direct cause of the injury to the plaintiff. It cannot be disputed, under repeated decisions of this Court, that such proof is sufficient to show a violation of the absolute duty imposed by this statute.

C. Q. & B. Railroad vs. United States, 220 U. S. 559;

C. R. I. & R. Railroad Co. vs. Brown, 229 U. S. 317;

San Antonio, etc., Railroad Co. vs. Wagner, 241 U. S. 476;

Atlantic City Railroad Co. vs. Parker, decided Dec. 4, 1916, U. S. Advance opinions, pamphlet No. 4, issued January 15, 1917, page 69.

Conceding, therefore, that the Safety Appliance Statute was violated, and that the violation of this statute contributed to the injury of the plaintiff (and since neither of these are disputed in the assignments of error they are necessarily conceded), the plaintiffs in error assert by their assignments of error in this Court that "the plaintiff Layton at the time of his injury was not at a place and so engaged, according to the undisputed evidence, as to place him within the purview of the Federal statute."

The plaintiff was assisting in coupling cars by taking the brakes off of some of the cars which were to be coupled. A coupling was attempted and the automatic couplers failed to work, as a result of which the cars were not held but rolled on down the track, collided with some standing cars and caused the plaintiff's injuries. It, therefore, must be conceded that the failure of the couplers to work directly caused the plaintiff's injuries. The contention of the plaintiffs in error under their assignments of error is that conceding this to be true, the provision in the Federal statute that an employee injured through a failure of the carrier to comply with the requirements of the statute does not assume the risk of injury is limited in its protection to employees actually going between cars.

This is the substance of the various assignments of error in this respect. From the premise that the plaintiff was not within the purview of the Federal statute, so as to be protected by it from the defence of assumed risk, the defendants argue that, therefore, the trial court erred in instructing the jury that the Georgia state statute abolished the defence of contributory negligence and assumption of risk, where the violation of a statute enacted for the safety

of employees contributed to the plaintiff's injuries. The non sequitur and the confusion between the Federal law and the State statute both seem to us to be clear. We will briefly present our reasons.

NO FEDERAL QUESTION IS PRESENTED.

The instructions complained of did not relate to the application of any Federal statute; no reference to any Federal statute, except possibly an indirect reference, is made; no reference to any such statute is more than indirectly involved. The State of Georgia has an Employer's Liability Act, which is on its face broad enough to include all railroad employees, but which by judicial construction is and must be so limited as to include only those employees not falling under the Federal Employer's Liability Act, but including all not so falling under the Federal Act. The State Act deals with the questions of assumption of risk and contributory negligence, and as to these subjects provides that the employee shall not be held to be guilty of contributory negligence, or to have assumed the risk in the case of any injury, "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury."

Code Sections 2783-2784.

This is a State statute, and not a Federal statute. This is the law the court gave in charge of the jury.

The court in its instructions on the first count of the petition did not make any reference, directly or indirectly, to any Federal statute on the subjects of assumption of risk or contributory negligence. He did not make any *direct* reference to *any* Federal statute which may be in-

cluded in the expression "any statute enacted for the safety of employees." If any reference at all was had to any such statute, it was an indirect reference to that portion of the Federal Safety Appliance Act, which imposes a duty as to the furnishing of automatic couplers.

If the instructions be construed as making an indirect reference to that statute, then the reference was not made to that statute for the purpose of instructing the jury that under the Federal Statute there could or could not be an assumption of risk or contributory negligence, but for the purpose of instructing the jury that if that Federal Statute was violated there could be no assumption of risk or contributory negligence under the State law.

Except as to employees falling within those categories as to which Congress has dealt on the subject of assumption of risk and contributory negligence, the State has the right to legislate. As to those employees not included within the scope of Federal legislation the State has the right to enact the same, or a different rule on the subject. Furthermore, though the State statute as to the employees not included within the Federal statute may be the same language as the Federal statute on the same subject, the State courts would have power, subject to no Federal right of review, to put an independent construction on its own statute. Decisions of the Supreme Court of the United States on the Federal statute might be, and indeed should be, strongly persuasive with the State Courts in construing the State statute, but would not be controlling; any alleged erroneous judgment of a State court in this respect would not be subject to Federal review. Indeed the State court might in an effort to harmonize the construction and

application of the State law to the construction and application which had been given the Federal statute by the Federal Supreme Court. reach a wrong conclusion, and give a construction or make an application different from the very decisions of the U. S. Supreme Court it might cite; but such an error would not be reviewable by the Federal Supreme Court.

Miller vs. Anderson, 150 U. S. 132; 37 Law Ed. 1028. Compare Union National Bank & Louisville Ry., 163 U. S. 325, 41 Law Ed. 177.

The language of *Miller vs. Anderson* is directly in point:

> "The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the state, does not make the determination of such rights a Federal question. A state may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

To speak concretely: In this case the errors assigned in the Supreme Court of the State of Georgia related to the instructions given by the trial court as to the range and

construction of a State statute which happens to be in practically the same language on the question of assumption of risk and contributory negligence as the Federal Employer's Liability Act, and the Federal Safety Appliance Act, and which adopts for its purposes the provisions of the latter act by reference. The Supreme Court of Georgia attempted to give the State statute the same construction as that given to the Federal statute by the United States Supreme Court, and for that purpose stated in its opinion the scope, construction and range which should be given to the Federal statute, from which the State statute is copied, and which it adopts by reference. The question, however, which the court was really determining, according to the record before it, and the errors assigned, was what is the range, scope and construction of the State statute. The plaintiff in error assigns error in this court alleging that the Supreme Court of Georgia gave a wrong construction to the Federal statute, by applying it in favor of an employee in a state of circumstances not intended by the Congress. The answer is that the Supreme Court of Georgia construed the Federal statute only arguendo, that is to say, for the purpose of showing that the trial court did not err in construing the State statute, in the same way in which it (the Supreme Court of Georgia) understood the United States Supreme Court to have construed the Federal statute. This presents no Federal question.

For example, suppose the State enacts a law that "no common carrier shall give any free pass for intrastate transportation to any person not entitled to receive free passes under the provisions of the Act of Congress relating to interstate commerce." Suppose a case arose in the State

court over an intrastate pass, and the point was involved as to whether the holder of the pass was one of the persons entitled to receive the same according to the provisions of the interstate commerce act; and the State Supreme Court, for the purpose of construing and enforcing its own act should give an erroneous construction to the Act of Congress, would the judgment, superinduced by this error, support Federal review? We believe not.

The error complained of in this court is that the court below erroneously held that by virtue of the State statute above referred to the requirement as to automatic couplers inured to the benefit of the injured employee who sued. There is no controversy as to what the Federal statute requires, or what constitutes a violation of it. The only question they seek to raise is whether the employee was so engaged at the time as to come within the purview of the Congressional action. If the employee was included within the scope of the Federal Act by virtue of Congressional action, then, of course, the point of plaintiffs in error falls entirely, for their whole point is that the scope of the Congressional enactment did not extend that far. If the employee was not included within the purview of the Federal Act by virtue of Congressional action, if his was a case and a condition which Congress had not covered, then he and his case and condition fell within the category upon which State enactments might operate, and it was competent for the State as to that legislative territory left out of the Congressional action, to pass a law which would give to him the same protection as that to which he would have been entitled if he had been included within the range of the Congressional Act.

It was within the scope of the State's legislative power to extend to those employees who had not been dealt with by Congressional action, the same rule as to contributory negligence and assumption of risk as that applied by Congress to the employees who did come within the operation of the Federal laws. The State legislature could do this by express language, but the effect, so far as Federal review is concerned, is the same where the Suprem Court of the State gives to the State enactment that effect though the State law be not couched in so many words.

In other words, if this employee was one of those upon whom the Act of Congress directly operated, then the point of the plaintiff in error is, by its very statement, bad. If the employee is not one of those upon whom the act of Congress operated he was one of those to whom it was competent for the State of Georgia to extend the benefit of the provisions of the Act of Congress, either as Congress had extended it or more broadly, and in that event it is for the State Court and not for this Court to say whether he was or was not one of those as to whom the State had abolished the doctrines of contributory negligence and assumption of risk.

As applied to the count on which a recovery was had, the court instructed the jury that the Georgia state law provided the exemption from these defenses under certain circumstances; and whether the State law was properly construed and applied in this respect is obviously not a Federal question which this court could review.

When analyzed the case falls within the decision in *Minneapolis, etc., R. R. Co. vs. Popplar*, 237 U. S. 369, which

holds that where suit is based on the Safety Appliance Act and certain defenses interposed, a ruling merely construing the State law in its relation to such defenses raises no Federal question.

THE DEFENDANTS DID NOT SPECIFICALLY SET UP ANY CLAIM TO A RIGHT, PRIVILEGE OR IMMUNITY UNDER THIS FEDERAL STATUTE.

If the Court should disagree with us in the contention that this whole matter is a question of State law, it would still be necessary to determine whether the defendants had specifically set up any claim of right, privilege or immunity under the Safety Appliance Act, which claim so specifically set up had been denied by the State courts. This is true because of the settled doctrine that on a writ of error to a State court, this Court does not exercise the jurisdiction of a general reviewing Court, but is limited to a consideration of the specific instances of denials of Federal rights which have been specially set up.

Waters-Pierce Oil Co. vs. State of Texas, 212 U. S. 86.

The only way in which it is claimed that the defendants specifically set up a right based on the Federal statute is by their motion for a new trial in which they excepted to certain instructions given by the Court. We recognize fully the rule that under some circumstances a Federal question may be set up in the motion for a new trial. We also recognize the rule that objection to instructions which construe and apply a Federal statute is a proper way to set up a Federal question. In the particular case, however,

the instructions objected to did not purport to apply a Federal statute, but purported to apply a State statute. It is submitted that objections to instructions in which the Court undertakes to apply a State statute do not "specifically set up" a Federal question, where no attack is made upon the validity of that statute and no claim made that it is superseded by Federal law.

The present case is similar to the case of *Seaboard Air Line Railroad Co. vs. Duvall,* 225 U. S. 477. In that case the suit was based on a Federal statute. The opinion of the highest court of North Carolina had treated a Federal question as presented to that court, and the certificate of its Chief Justice on the writ of error to this Court stated that a Federal question was involved. This Court, however, examined the record and found that while the action was based on the Federal law, the only exceptions in the record related to instructions which purported to apply the State law, and not the Federal statute, (the State rules of law being relevant to certain features of the case). The Court, therefore, held that no Federal right appeared to have been specifically set up. The Court points out the limitation on its reviewing powers, where a case comes from a State court. In part the Court says:

> "It was the obvious duty of counsel, if they wish any particular construction of the Act, to put the request in such definite terms as that the attention of the Court might be directed to the point, and the record here should show that the right now claimed was the right specially set up and denied by the Court."

It is conceded that if a Federal Act was erroneously construed and exceptions reserved, or if a particular construc-

tion to which a party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this Court, as was held in *St. Louis, etc. Railroad Co. vs. Taylor*, 210 U. S. 281, and in several later cases, with which the Court is familiar. In the present case no request for instructions were submitted, and the exceptions reserved related not to a construction of the Federal Act, but to an instruction which by its express language purports to give in charge to the jury a Georgia statute, which the Trial Judge calls by name as the basis of the instructions he is giving, to-wit, the "Employers Liability Act of the State of Georgia." (Transcript, pages 53-54). *This is the only point at which the defendant took any action which is now claimed to specifically set up a right under a Federal statute; and the action actually taken was an exception to instructions which construed a Georgia statute.*

The Court's attention is invited to the recent case of *Louisville & Nashville Railroad Company vs. Parker*, decided Nov. 13, 1916, U. S. Supreme Court Advance opinions, pamphlet of Dec. 15, 1916, No. 2, page 4, as an illustration of the necessity of examining the proceedings actually had in the trial court to determine whether a right under a Federal statute has in fact been specifically set up and denied. The Court says in part, "but it is necessary to see how the case was dealt with in the trial court." An examination of the opinion of the Supreme Court of Kentucky in that case, 165 Ky. 658; 177 S. W. 465, shows that the Supreme Court of Kentucky did in fact consider the Federal question. It may very often happen that a State court can consider, under its powers as a general reviewing Court a Federal question which did not involve a right

or immunity under the Federal statute specifically set up in the trial court, when this Court with its more limited jurisdiction under writs of error to State Courts could not consider the same question. This is exactly what happened in the *Parker case*, and the distinction between the power of a general Court of review and the power of this Court on writ of error to a State Court is clearly pointed out by this Court in the *Duvall case*.

3.

ALLEGED FEDERAL QUESTION IS FRIVOLOUS.

Briefly the contention of the plaintiffs in error is that the provision in the Safety Appliance Act exempting from the doctrine of assumption of risk those injured through a violation of the statute is limited solely to the protection of employees actually going between cars, and that the trial court erred in instructing the jury in such a way that they might apply this provision to the plaintiff in this cause. The action of the Supreme Court was only an affirmance of the trial court's judgment, and the exceptions reserved and presented to the Supreme Court only relate to the charge.

We have already pointed out that the trial court gave no instructions whatever under the Federal statute, but specifically charged a State statute. The plaintiffs in error do not complain that it was error to charge the State statute upon the theory that the Federal law applied and was exclusive, and no question of this character is involved in the case. Indeed, the proposition on which the plaintiffs in error plant their assignments is that the plaintiff was

not within the scope of the Federal statute, and that the Court erred in charging the Federal statute, thereby overlooking the fact that the Court gave no such charge.

To argue the merits of the theory of law presented by the plaintiffs in error, we must assume that the trial court instructed the exemption from the defence of assumption of risk provided by the Federal Safety Appliance Act, and must disregard what the record shows as the actual fact that a State statute was given in charge.

Undoubtedly the car being a car of an interstate carrier was within the scope of the Federal statute.

Southern Railway Co. vs. U. S., 222 U. S. 20.

There is no controlling decision as to whether every employee working with a car of an interstate carrier is entitled to the immunity from the defence of assumption of risk provided for by the Federal Safety Appliance Act, or whether this protection is limited to employees while they themselves are engaged in interstate commerce so as to make this provision of the Act apply to those employees governed by the Federal Employers Liability Act.

If this provision of the Safety Appliance Act is so limited, then it did not apply to Layton, and it would necessarily follow that he was within the field covered by the State statute which contains an exactly similar provision, and which State statute was applied.

This is the effect of the trial court's charge, and no point is raised as to whether or not it was error to apply the State law, and, therefore, there is no question really before the Court.

If we assume as true the erroneous supposition on which the assignments of error are based, namely, that the Court instructed under the Federal statute, and that the matter is within the domain of the Federal Legislation, it is possible to consider the soundness in law of the position relative to the Federal Safety Appliance Act presented by the plaintiffs in error.

That position is that an employee engaged in coupling cars, and who is injured when relying on automatic couplers to work, and because the automatic couplers do not work is not in a position where he can claim the benefit of the statute abolishing the defence of assumption of risk; but that such protection applies *only* to those going between cars.

In other words, the plaintiffs in error construe the statute as saying to an employee, "you must not go between cars to make couplings but must rely upon the automatic couplers to work", and then further saying to such employee when injured, "you cannot rely upon this statute because you did not go between the cars to make a coupling, but did rely upon the automatic couplers to work."

There is no language in the statute justifying such construction.

Such a construction is opposed to the only cases in point.

Chicago, etc. Railroad Co. vs. King, 169 Fed. 372.

Johnson vs. Great Northern Railway Co., 178 Fed. 643.

The case of *St. Louis, etc., Railroad vs. Conarty*, 238 U. S. 243, is entirely different from the case at bar, as is pointed out by the Supreme Court of Georgia. Conarty was not attempting to make a coupling, but was merely riding on the front of the engine which collided with some cars. He was not attempting to use the Safety Appliance couplers to couple cars, and his injury was not due to their failure to couple cars. His sole claim was that if the appliances had been supplied they would have projected a sufficient distance to hold the engine and car apart. The decision in that case goes no further than holding that the purpose of automatic couplers is to hold cars together, not to hold them apart. The decision furnishes no support for the position of the plaintiffs in error.

Respectfully submitted,

Marion Smith.

Attorney for Defendant in Error.

In the Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Lessees of Georgia Railroad & Banking Company, et al.,

Plaintiffs in Error,

vs.

O. T. LAYTON,

Defendant in Error.

No. 93.

October Term, 1916.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

In the Supreme Court of the United States

LOUISVLLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Lessees of Georgia Railroad & Banking Company, et al.,

Plaintiffs in Error,

vs.

O. Y. LAYTON,

Defendant in Error.

No. 840.

October Term, 1916.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

The Defendant in Error, Layton, has filed in this Court his motion to dismiss the writ of error for lack of jurisdiction in this Court to entertain it.

The motion to dismiss is based upon the grounds:

(1) That as to the first Federal question under the Federal Employers' Liability Act, no such Federal question was properly raised in the State Court, and that the State Law was more favorable to Plaintiffs in error than the Federal law, and that the question presented is therefore frivolous.

(2) That the second Federal question under the Fed-

eral Safety Appliance Act of March 2nd, 1893, (27 Statutes, 531, C. 193) as amended by the Act of March 3rd, 1903, (32 Statutes, 943, C. 976) imposing the duty on common carriers engaged in interstate commerce to equip their cars with automatic couplers as therein provided, involves no Federal question, but a question of State law; that no right under the said Federal Statute was specifically set up; and that if the alleged Federal question had been involved in the case, the contentions of Plaintiff in error with respect thereto are too frivolous to support a writ of error to this Court.

In order to understand the questions involved in this motion it is necessary to refer in some detail to the pleadings and proceedings and rulings made in this case.

O. Y. Layton, the Defendant in Error, filed suit against the Railroad Companies, the Plaintiffs in Error, in the State Court in Fulton County, Georgia, for damages for personal injuries received by him as an employee of said Railroad Companies. His right to recover was based upon certain alleged negligence of the Defendants. His suit was laid in two counts. The first count was based upon the State law and the second count upon the Federal Employers' Liability Act. The manner of his injury in each case was the same. In each count was an allegation that the railroads were common carriers by rail and carriers of interstate commerce. In each count the allegations of negligence were the same. Layton was injured while a yard engine with which he was working was making up a train. At the time of his injury he was on top of certain cars letting off brakes on the cars with which his engine was to couple. His engine backed against the cars and in this operation he was knocked off the cars and injured. The allegations of negligence in each count were (1) that the cars and engines with which he was working were not equipped with automatic couplers which would couple with each by impact, and (2) that the engine struck the cars a violent, un-

usual and unnecessary blow when it attempted to couple to them.

The only difference between the two counts of Layton's petition for damages was that in the second count he alleged that the carriers were engaged in interstate commerce and that he was employed in such commerce at the time of his injury, while this allegation was omitted from the first count. This additional allegation in the second count was intended only to bring that count under the Federal Law. (See petition of Layton, pages 18, 19, 20 and 21 of printed record).

1. THE FIRST ASSIGNMENT OF ERROR IS SET FORTH ON PAGE 8 OF THE PRINTED RECORD.

The motion to dismiss as to this first assignment of error contends:

(1) That the question presented in this assignment was not properly raised in the State Courts.

(2) That the State law in this case was more favorable to the Defendants than the Federal Law and the question raised is therefore frivolous.

(3) That the contention that the State Law did not apply is frivolous.

It will be specifically noted that the motion to dismiss as to this first assignment of error is not based upon the contention that a Federal question is not therein involved. We will consider seriatim the three contentions of Defendants in Error as to this assignment of error:

(1) The question presented in this assignment was properly raised in the State Courts. This suit was based upon two counts, one upon the State Law and the other upon the Federal Law. Throughout the trial it was contended by defendants that plaintiff, having brought his suit in two counts based on different laws, must carry the burden of proving those facts which would support the one count or the other under the law applicable to the respective counts.

In the twelfth ground of the amended motion for new trial filed in the State Court by the Railroad defendants, this question was specifically presented. (See amended motion for new trial, pages 42 and 43 of printed record.) This ground of the amended motion was approved as "true and correct" by the Presiding Judge in the State Court. (See printed record, page 43.) Under the practice in the State of Georgia questions are properly presented in this way in motions and amended motions for new trial, and to insure their full consideration by the trial Court and the Supreme Court of the State it is only necessary that such grounds for new trial be approved as true and correct by the trial Judge. That this question was properly presented in the State Courts is further shown in that the Supreme Court of Georgia passed upon the question in the language to which this assignment of error takes exception. (See opinion of Supreme Court of Georgia, 2nd head note, page 89 of printed record.) It is upon this language of the Supreme Court in considering this question, after the question had reached it in the proper channels and had been legally presented to it, that the first assignment of Plaintiffs in Error is based.

(2). The second contention of Defendants in Error as to this first assignment of error is that in this case the State Law is more favorable than the Federal Law, and this question is therefore frivolous.

The question involved is not as to which law is more favorable to Defendant carriers. The question is only as to which law is applicable. Did Plaintiff have a cause of action under the State or under the Federal law? He could not have a cause of action under both laws. Either the one or the other law was applicable to his facts. In bringing his suit in two counts he initially assumed the burden of proving the necessary facts to enable him to recover under the one count or the other. This contention properly made in the State Court and urged in the writ of error to this Court, is that Layton, having brought his suit on a count based on the State Law, must prove facts to show that he was engaged in intrastate commerce before he could recover on this count. Layton would have had to prove that he was engaged in interstate commerce in order to recover upon the Federal count. We feel that in a suit based on two counts an equal burden was upon him to prove that he was engaged in intrastate commerce before he could recover upon the count based upon the State Law. Layton raised the question of the character of his employment when he filed his petition in two counts based upon different laws. It was necessary for him to prove facts to sustain his right to recover upon the one count or the other. The evidence was silent as to the essential fact necessary for him to prove, namely: the character of commerce in which he was engaged, in order to enable him lawfully to recover upon the count based upon the law applicable to such fact when proved. In the absence of evidence showing either interstate or intrastate commerce at the time of his injury, he failed to prove an essential fact to enable him to recover under either one of the counts of his petition. The fact that the State law may have been more favorable to defendants than the Federal Law did not make the State law the applicable law. The case of *Chicago & Northwestern Ry. Co. vs. Gray*, 237 U. S. 399, cited by distinguished counsel for Defendant in Error, is not pertinent to the pe-

culiar question involved. In the Gray case there were not two counts, one based on the State law and one based on the Federal law, and there was therefore no necessity upon plaintiff to prove facts showing which law was applicable. In the Gray case the Railroads tried and were not allowed to show that Gray was engaged in interstate commerce, and this Honorable Court simply held that the case would not be reversed because this evidence was not admitted, if it did not appear that defendants' position was worse because the State, instead of the Federal law, governed the case. There was no question of two counts based on different laws and as to which count under the facts necessary to be proved by plaintiff was applicable.

The fact that the State law may have been more favorable to defendant than the Federal law would not make the question frivilous. If the question is pertinent it is fundamental. It goes back to the burden upon a plaintiff to prove facts necessary to enable a jury to render a legal verdict in his favor. The present case differs also from the case cited by distinguished counsel for Defendant in Error of *Kansas City Ry. Co. vs. McAdow*, 240 U. S. 51. In that case there was but one count, and the present question as to a lack of evidence to sustain a verdict upon one of two counts was not involved.

The contention that the State law did not apply is not frivolous. The evidence was silent as to the character of commerce engaged in by plaintiff and defendants at the time of plaintiff's injury. The allegation of plaintiff was that defendants were interstate carriers. The proof verified this allegation, but was silent as to the character of commerce the parties were engaged in at the time of plaintiff's injury. There was no presumption as to this. Proof was necessary before a legal verdict could be rendered under either count.

Distinguished counsel for Defendant in Error argues that this question is not pertinent, because a railroad must

plead the Federal Employers' Liability Act if it wishes to avail itself of the defense based upon this Act in a suit brought upon the State law, and in support of this contention cites the case of *Louisville & Nashville Railroad Co. vs. Barrett*, 143 Ga. 172. This case is again not decisive of the present question. In this Barrett case there was but one count and the present question as to the necessity of proof to sustain one of two counts was not involved. Distinguished counsel argue in their brief in support of their motion to dismiss that it would have been error to apply the Federal Statute in the absence of proof that plaintiff was engaged in interstate commerce, and in support of this argument cite the case of *Minneapolis, St. Paul, etc., R. R. vs. Popplar*, 237 U. S. 369. We agree with this contention of counsel and contend that it follows that in this suit based on two counts it was error to apply the State law without proof that Layton was engaged in intrastate commerce, so as to make the State law the applicable law.

Since Defendant in Error in his motion to dismiss has not attacked this first assignment of error on the ground that it embraces no Federal question, it would seem that any argument on this point is unnecessary. We felt in the trial of this case that we were entitled to have the case tried under the law applicable to the facts and that the burden was upon plaintiff to prove the facts which would show whether the State or Federal law was applicable, and that if the facts necessary to be shown by plaintiff in making out his case showed that the Federal law was applicable, we were entitled to have the case tried under that law. In this the State Courts ruled against us, and in this ruling we felt that we were deprived of the right, privilege and immunity to which we were entitled under the Federal Employers' Liability Act.

In order to deal in perfect frankness with this Court we have submitted this statement as to the inclusion of this

first assignment in our assignment of errors to this Honorable Court.

II. THE MOTION TO DISMISS THE WRIT OF ERROR IS NEXT FOUNDED UPON THE CONTENTION THAT THE SECOND AND THIRD ASSIGNMENTS OF ERROR INVOLVE NO FEDERAL QUESTION, BUT A QUESTION OF STATE LAW; THAT NO RIGHT UNDER THE FEDERAL STATUTE WAS SPECIFICALLY SET UP; AND THAT IF THE ALLEGED FEDERAL QUESTION WAS INVOLVED THE CONTENTIONS OF PLAINTIFFS IN ERROR WITH RESPECT THERETO ARE TOO FRIVOLOUS TO SUPPORT A WRIT OF ERROR.

We will consider these grounds seriatim.

(1) Do the second and third assignments of error relate to the Federal Statute or was only a State law involved?

The verdict in this case was rendered on the first count, which was based on the State law.

The law relative to the liability of railroad companies to their employees in cases of injury is contained in Sections 2782, 2783, 2784, 2785, 2786 and 2787, of the Code of Georgia of 1911. This Statute Law, after providing for a recovery by an employee injured through the negligence of a railroad, provides in Section 2783 as follows:

> "No such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

And provides in Sec. 2784 as follows:

> "In any action brought against any common carrier under and by virtue of any of the provisions of the two preceding sections (sections relating to liability) to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee."

The safety appliance acts referred to in these Georgia Statutes are the Federal Safety Appliance Acts. There are no Georgia Statutes on the subject. The Georgia Statute Law has made no provision or requirement as to the installation of safety appliances upon the cars of carriers. The Federal Safety Appliance Acts are the law in Georgia and the State Statutes recited so recognize it. The trial court and the Supreme Court of this State recognized that the Georgia Statutes refer to the Federal Safety Appliance Acts and in their judgments construe the Federal Safety Appliance Acts.

The Plaintiff in Error has never contested the fact that the safety appliance acts referred to in the Georgia Statutes are the Federal Acts. In the first count of his petition based on the State law he alleged that Defendants were interstate carriers and alleged that they were negligent in not equipping their cars with automatic couplers which would couple with each other by impact. In these allegations he was bringing the defendant Railroads as interstate carriers into court and charging them with liability for failure to comply with Federal Coupling Act. In his first count he brought the defendants squarely within the ruling of this Honorable Court in the case of *Southern Railway Company vs. United States*, 222 U. S. 20.

The State Statutes merely assert that if under the Federal Safety Appliance Acts Layton was within the protec-

tion of these Acts, the consequences provided by these Federal Acts would follow, towit: he would not be prevented from recovery by reason of his contributory negligence or assumption of risk in event such Federal Act was violated.

The Supreme Court of Georgia in its decision recognized that the Georgia Statutes referred only to the Federal Safety Appliance Acts. The decision of this highest Court in the State referred to the Federal Safety Appliance Acts by name and stated that they applied to the cars of interstate carriers engaged in transporting intrastate freight, and on this point cited the case of *Southern Ry. Co. vs. United States*, 222 U. S. 20, and disposed of the grounds of the motion for a new trial based upon the construction of these Federal Statutes by itself construing them and undertaking to differentiate their application in the present case from their application in the case of *St. Louis & San Francisco Ry. Co. vs. Conarty*, 238 U. S. 243. In dealing with this feature of the case the Georgia Supreme Court did not undertake to construe the Statute merely as a State Statute, but passed upon and determined the rights of Layton and the liability of the defendant carriers as governed and controlled by the Federal Statute which was applicable and controlling. The decision was a decision of a Federal character. It determined the rights of the parties as controlled by the Act of Congress. The inquiry along Federal lines was not merely incidental. It was controlling under the question made.

The Georgia Supreme Court held that a Federal question was made before it according to its practice and the practice in this State and proceeded to determine that question. In situations similar to this this Honorable Court has repeatedly held that a Federal question was thus duly made. In the case of *Miedreich vs. Louenstein*, 232 U. S. 236, this Court says:

"Although the record is meager of attempts to raise

it, if the State Court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this Court regards the question as duly made."

And again in the case of *Montana ex rel. Haire vs. Rice, State Treasurer*, 204 U. S. 291, this Court says:

"Although a Federal right may not have been specifically set up in the original petition or earlier proceedings, if it clearly and unmistakably appears from the opinion of the State Court under review that a Federal question was assumed by the highest Court of the State to be in issue and was actually decided against the Federal claim, and such decision was essential to the judgment rendered, this Court has jurisdiction to reexamine that question on writ of error."

And again in the case of *Chambers vs. B. & O. R. R.*, 207 U. S. 142, this Court says:

"This Court has jurisdiction to review the judgment on writ of error, if the opinion of the highest Court of the State clearly shows that the Federal question was assumed to be in issue, was decided adversely and the decision was essential to the judgment rendered."

And again in the case of *Atchison, Topeka & Santa Fe Ry. vs. Sowers*, 213 U. S. 55, this Court says:

"Where the opinion of the State Court shows that it considered and denied the validity of a statute of another State, and its binding force to control the right of action asserted, a Federal right specifically set up is denied and this Court has jurisdiction to review the judgment under Section 709 of the Revised Statutes."

Measured by these decisions of this Honorable Court two things clearly appear:

(A) That this Court has jurisdiction to consider this Federal question.

(B) That a Federal question was involved and that the decision of the Georgia Supreme Court which considered such question, determined it and made a decision relative to it upon which the judgment in the case depended.

2. WAS A RIGHT UNDER THE FEDERAL STATUTE SPECIFICALLY SET UP?

The plaintiff in his petition set up the Federal question arising under the Federal Safety Appliance Act. He sued the defendants as interstate carriers liable to him for damages resulting from their failure to comply with the Federal Safety Appliance Act. The defendants in their answer denied the violation of this Federal Act. (See answers of defendants, page 26 and 29 of printed record.) In the trial evidence was adduced on this question. (See brief of evidence, page 63 to 87 of printed record.) In his charge to the jury the trial Judge repeatedly charged on the consequence to the defendants if this Federal Act was violated. (See charge of the court, pages 53, 54, 55 of printed record, and second and third assignments of error containing exceptions to portion of the Court's charge, page 6-8-9-10 of printed record.) The Federal question was repeatedly made in defendants' amended motion for new trial. (See amended motion for new trial, page 4 printed record.) A Federal right may thus be set up in a motion for new trial. Moreover, the assignment of error to the State Supreme Court set up this Federal question in that error was specifically assigned in the bill of exceptions to the Supreme Court of Georgia based upon the action of the lower court in overruling defendants' motion and amended motion for new trial containing grounds embracing this Federal question. This Court in the case of *San Jose Land & Water Co. vs. San Jose Ranch Co.*, 189 U. S. 177, says:

> "Although no Federal right, title or immunity was specifically set up or claimed in the complaint, it is sufficient if it appears in the motion for new trial and in the assignment of error in the State Supreme Court."

The decision would seem to be controlling of the fact that a Federal question was properly presented for the consideration of this Court.

Finally, the judgment of the Georgia Supreme Court which is complained of in the writ of error to this Honorable Court specifically considers and determines this Federal question. In these different ways this Federal question was specifically set up and a judgment was rendered thereon, and upon their construction which is complained of the judgment rendered was dependent.

(3) IS THE FEDERAL QUESTION INVOLVED FRIVOLOUS, OR TOO FRIVOLOUS TO SUPPORT A WRIT OF ERRR?

The Federal question involved was fundamental as to the rights of the parties in this case. The plaintiff, in the construction by the Courts of Georgia of the Federal Safety Appliance Act involved, was given the benefit of his exemption from contributory negligence and assumption of risk, and the defendants were deprived of these two defenses under the construction given. If the plaintiff was within the purview and protection of this Federal Act, the construction of this Federal Statute was correct. If he was not, then the Federal Act was not applicable, he was not entitled to its immunities, and the defendants were not liable to its penalties. The constructions given this Federal Act by the Georgia Courts placed him within its purview and protection. If this construction was wrong, then fundamental and not frivolous wrong resulted, and in no aspect of this question can it be considered frivolous.

It is respectfully submitted that not only is the question not frivolous, but that the contention of the defendants that the construction was manifestly wrong is sound. Layton was a switchman. His crew was engaged in making up a train. He was on top of the cars letting off brakes. The engine collided with the cars. Layton was knocked off the top of the cars and injured. He was performing no task in connection with the couplers. He was outside the purview of the Federal Coupling Act. That Act is made only for the protection of employees engaged in coupling or uncoupling cars. It requires cars to be equipped with couplers which couple automatically by impact so as to prevent the necessity of men going between the cars. The decision of this Honorable Court in the case of *St. L. & S. F. Ry. vs. Conarty*, 238 U. S. 243, is controlling. The Supreme Court of Georgia endeavored to differentiate the facts in the present case from the Conarty case. It made a construction of the Federal Safety Appliance Act different from the construction made by this Honorable Court in the Conarty case. It is respectfully submitted that the construction of this Act by this Court in the Conarty case was correct, was controlling of this case, and that the Supreme Court of Georgia in not following the Conarty case misconstrued and misapplied this Federal Act and in its erroneous judgment deprived the defendants of their rights, privileges and immunities under this Federal Act.

That the jurisdiction of this Court is complete to consider the Federal questions presented in the assignments of error is clearly shown in the case of *St. L. & Iron Mountain R. R. vs. Taylor*, 210 U. S. 281. This Court in its decision discusses its jurisdictional power to review such questions, and after stating its jurisdictional powers and the authority for the exercise of such powers, on page 293 says:

> "Where a party to litigation in a State Court insists, by way of objection to or request for instructions, up-

on a construction of a statute of the United States which will lead, or on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect being duly set up is denied by the highest Court of the State, then the question thus raised may be reviewed in this Court. The plain reason is that in all such cases he has claimed in the State Court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.

"It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a verdict against it, and insisted upon a correct construction of the Act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here."

It is respectfully submitted that Federal questions are properly presented in this case to the consideration of this Court and that the jurisdiction of this Court to consider them is complete.

Defendant in Error incorporates in his motion to dismiss the writ of error a request that this Honorable Court, in event his motion is denied, assign this cause to the summary docket under the Sixth Subdivision of the Sixth Rule of this Court. We oppose such assignment and respectfully contend that this case does not fall within the class of cases to which this rule is applicable. The amount of

the verdict in this case is large and the questions involved are of such character and of so much importance to the Plaintiffs in Error as to justify extended argument upon them. This is especially true relative to the question presented as to whether the Federal Safety Appliance Act providing for automatic couplers is applicable to a trainman who at the time of his injury is not engaged either in coupling or uncoupling cars.

Respectfully submitted,

W. Daniel & Black

Dorsey, Brewster, Howell & Heyn

Frye, Peeples & Fry

Attorneys for Plaintiffs in Error.

H. Brewster.

H. C. Peeples

Sanders McDaniel

R. Block

of Counsel.

FILED
APR 2 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Lessees of Georgia Railroad & Banking Company, et al.,
Plaintiffs in Error,
vs.
O. Y. LAYTON,
Defendant in Error.

No. 840.
OCTOBER TERM 1916.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

H. C. PEEPLES,
F. H. BREWSTER,
E. R. BLACK,
SANDERS McDANIEL,
Attorneys for Plaintiffs in Error.

PRESS-BAILEY CO., ATLANTA

INDEX

ORIGINAL BRIEF

Page of Brief

Statement ..... 1 to 5

Specifications of Error ..... 5 to 8

Agreement ..... 9 to 26

Chicago & Northwestern Ry. vs. Gray, 237 U. S. 399 .. 11

East Tennessee, Va. & Ga. R. R. vs. Feathers, 78 Tenn., 103 21

Favor vs. Boston & Lowell R. R., 114 Mass., 350 21

Johnson vs. Southern Pacific R. R., 196 U. S., 1 15

Kansas City Ry. Co. vs. McAdow, 240 U. S., 51 11

Louisville & Nashville R. R. vs. Barrett, 143 Ga. 742 .. 11

Minnesota, St. Paul, etc. R. R. vs. Popplar, 237 U. S., 369 ..... 11, 12

Metallic Impression Casting Co. vs. Fitchburg R. R. Co., 109 Mass., 227 20

Macon Ry. Co. vs. Parker, 127 Ga., 471 23

O'Donnell vs. Providence & Worcester R. R., 6 R. I. 211 19

St. Louis & San Francisco Ry. vs. Conarty, Admx., 238 U. S., 243 15

Southern Railway Co. vs. Pugh, 143 Ga., 294 24

Texas & Pacific Ry. Co. vs. Rigsby, 241 U. S., 33 25

Williams vs. Chicago & Alton R. R., 135 Ill., 491 18

IN THE

Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, Lessees of Georgia Railroad & Banking Company, et al.,

Plaintiffs in Error,

vs.

O. Y. LAYTON,

Defendant in Error.

No. 840.

OCTOBER TERM. 1916.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

O. Y. Layton filed suit against the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, as Lessees of the Georgia Railroad & Banking Company, and the Atlanta & West Point Railroad Company and the Louisville & Nashville Railroad Company, for damages for personal injuries received by him as an employee of said Railroad Companies, which maintained and operated joint freight terminals and a joint freight depot in the City of Atlanta under the name of "Atlanta Joint Terminals." In his petition he alleged that he was a switchman and that in the performance of his duties he went upon a cut of cars to release the brakes thereof, so that the engine of the Railroad Companies might couple to these

cars and remove the same, and that while engaged in this task the engine of the Railroad Companies approached the cars to couple to them and struck them a violent, unusual and unnecessary blow and that the engine failed to couple to said cars by impact, and because of the failure to so couple and because of the violence with which the engine struck the cars, the cars were knocked violently down the track and against other cars standing on the track, by reason of which Layton was knocked from the car, receiving the injuries set forth in the petition.

Layton alleged that the defendant railroad companies were common carriers by rail and carriers of interstate commerce. The negligence alleged was: (1) that the cars and engine were not equipped with automatic couplers which would couple with each other by impact; (2) that the engine struck the cars a violent, unusual, and unnecessary blow when it attempted to couple to them; (3) that the engine was not equipped with a power driving brake wheel. The third ground of negligence, to-wit: that the engine was not equipped with a power driving brake wheel, was abandoned by the plaintiff during the trial and the case was tried upon the other two allegations of negligence.

Layton's suit was filed in two counts. The first count was based upon the State Law and the second count was based upon the Federal Employer's Liability Act. The manner of his injury and the negligence alleged in each count was the same. The only difference between the two counts of Layton's petition for damages was that in the second count he alleged that the carriers were engaged in interstate commerce and that he was employed in such commerce at the time of his injury, while this specific allegation was omitted from the first count. This additional allegation in the second count was intended only to bring that count under the Federal Law. (See petition, page 18 of printed record.)

The evidence disclosed that Layton was a switchman and that his crew was engaged in making up a train in the yards in Atlanta; that in the performance of his duty he was on top of the cars letting off brakes; that the engine came back to couple to these cars. The evidence was conflicting as to whether it coupled or not, though the probability under the evidence is that the engine did not couple to these cars. These cars were either pushed or knocked by the engine against other cars on the track and in this impact Layton was knocked off the top of the cars and injured.

The evidence is conflicting as to the manner of the coupling which was attempted—as to whether it was made in the usual manner or in a severe manner. The evidence is conflicting as to the condition of the couplers between the cars which were to be coupled and as to the cause of their not coupling. There is no conflict in the evidence that after Layton was injured couplings were made without difficulty between these same cars and they were removed from this track. The evidence was absolutely silent as to the character of commerce engaged in by the parties at the time of Layton's injuries. It was not shown to be either intrastate or interstate commerce. In the absence of this evidence both counts were submitted to the jury and the jury was left to determine upon which count a recovery could be found. (See evidence, pages 63 et seq. of printed record.)

In the trial Court's charge to the jury the two allegations of negligence were submitted for the jury's consideration. The verdict of the jury was in favor of Layton and against the Railroad Companies, and was found upon the first count of the petition based upon the State Law, and it may be conceded that the jury's finding settled adversely

to the Railroads the question of the Railroads' negligence in the two respects alleged in the petition, to wit: (1) that the couplers did not couple by impact, and (2) that in the coupling movement the engine struck the cars an unusual and unnecessary blow.

In the Court's charge to the jury he repeatedly instructed the jury relative to the plaintiff's rights and the defendants' liabilities with respect to the alleged violation by the Railroad Companies of the Safety Appliance Act requiring automatic couplers which couple by impact without the necessity of a man going between the cars to uncouple them. (See Charge of the Court, pages 44 et seq. of printed record.)

After the verdict against the defendants was rendered by the jury the defendants made a motion for new trial, and prior to the hearing upon this motion for new trial filed their amended motion for new trial. In the motion for new trial the grounds were: that the verdict was contrary to law, contrary to the evidence and without evidence to support it, and that the verdict was excessive.

In the amended motion for new trial the grounds were:

(1) That the verdict found upon the first count of the petition, namely: the count based upon the State Law, was illegal by reason of the fact that no evidence was introduced showing that either Layton or the Railroads were engaged in intrastate commerce at the time of his injury; that the suit having been brought in two counts, one upon the State Law and one upon the Federal Law, the burden was upon Layton to show the character of commerce in which he and the Railroads were engaged at the time of his injury, in order that a legal verdict might be rendered upon either count, and that in the absence of such evidence a legal verdict on either count against the defendants could not be rendered.

(2) That the Court erred in repeated instances in his instructions to the jury relative to the second ground of negligence in the petition, to wit: the ground based upon the alleged violation of the Safety Appliance Act known as the Federal Automatic Coupling Act, in that by these instructions he brought Layton within the purview and protection of that Safety Appliance Act, whereas Layton at the time of his injury, not being engaged in any task in connection with the couplers on said cars, was without the purview and protection of that Safety Appliance Act and was not entitled to its advantages, and the Railroads in this situation were not liable for its penalizing provisions.

The motion and amended motion for new trial were overruled by the trial Court. The defendant Railroad Companies then sued out a writ of error to the Supreme Court of Georgia, seeking to review in that appellate Court the errors assigned upon the trial of the case, and specifically the error of the trial Court in denying and refusing defendants' motion for new trial upon each of the grounds thereof. (See motion and amended motion for new trial, pages 34 et seq. of printed record.)

The Supreme Court of Georgia affirmed the judgment of the lower Court. A writ of error to this Court from the Supreme Court of Georgia was then sued out and the case is now pending here upon such writ of error.

SPECIFICATIONS OF ERROR.

Plaintiffs in Error specify as follows the errors which they urge and upon which they rely to reverse the judgment of the Supreme Court of the State of Georgia affirming the verdict and judgment against them.

1. The Plaintiffs in Error respectfully assert and contend that the Supreme Court of Georgia erred in holding

that: "Evidence that plaintiff was injured in the switching yards of the defendants in the City of Atlanta by an engine and cars of the defendants which he was engaged in operating for them, will support a verdict for the plaintiff where otherwise authorized under the first count (Statute Law of Georgia), without evidence showing affirmatively that the parties were not engaged in interstate commerce at the time of the injury."

2. Plaintiffs in Error respectfully assert and contend that the Supreme Court of Georgia erred in holding as follows:

> "The Safety Appliance Act of March 2nd, 1893, (27 Statutes, 531 C. 196) as amended by the Act of March 3rd, 1903, (32 Statutes, 943, C. 976), imposes a duty on freight common carriers engaged in interstate commerce by railroad to equip its cars with brakes, etc., as therein provided, and this demand of the Statute applies to the cars of such interstate carriers engaged in transporting intrastate freight. *Southern Ry. Co. vs. Indiana R. R. Com.*, 236 U. S., 439. *Southern Ry. Co. vs. U. S.*, 222 U. S. 20. The design of the Statute is for the protection of the employees of an interstate carrier engaged in the operation of its cars, whether such cars were transporting interstate or intrastate freight. A brakeman whose duty it is to assist in the coupling of cars comes within its protection, and if such brakeman is injured in the discharge of his duties connected with making up trains, which is accomplished by the coupling or uncoupling of cars, and his injuries are due to the fact that the cars are not equipped as required by the Statute, in the absence of other facts discharging liability, the plaintiff may recover for such injuries. This case differs in facts from *St. Louis & San Francisco Ry. Co. vs. Conarty*, 238 U. S., 243."

3. Plaintiffs in Error respectfully assert and contend that the Supreme Court of Georgia erred in holding that the trial court did not err, but correctly charged the jury with the following instructions, to-wit:

(a). "The law (Georgia State Law) under consideration provides further 'that in any action brought against any common carrier under and by virtue of the two preceding sections to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury of such employee.'"

(b). "The fact that the employee may have been guilty of contributory negligence not amounting to a failure to exercise ordinary care would not be a bar to recovery, but the damages would be diminished by the jury in proportion to the amount of negligence attributable to him. As before stated, no such employee who may be injured shall be held to be guilty of contributory negligence in any case where the violation by such common carrier of a statute enacted for the safety of employees caused or contributed to the injury of such employee."

(c). "I have already explained to you what the situation would be as to his contributory negligence and assumption of risk, if the plaintiff's injuries were produced by defects or by a failure rather of the defendants to furnish appliances, safety appliances, required by law."

(d). "If you believe under the evidence and under this count (first count under the Georgia Law) that the defendants were negligent in the operation of their engines, cars and machinery, and not in respect to the

appliances required by law, then the plaintiff would be entitled to recover, reducing his damages according to the proportion you believe negligence may be attributable to him; but, as before stated, if you believe the plaintiff is entitled to recover, and that the defendants' negligence consisted of a failure to comply with any law enacted for the safety of employees and that negligence caused or contributed to the injury, then the plaintiff would be entitled to recover without diminution of damages on account of contributory negligence, if any such existed."

(e). "The general rule of law is that a servant—that is, an employee—assumes the risk of his employment and is bound to exercise his own skill and diligence to protect himself. That is the general rule and in this case and under this first count (count under the Georgia law), if you believe this plaintiff was injured and his injuries were brought about by the negligence of the defendants, as alleged in his petition, and that such negligence was not due to any defect or insufficiency due to its negligence in its cars, engines, appliances or other equipment, then this general rule as to the assumption of risk by the plaintiff will apply."

4. That the Supreme Court of Georgia erred in affirming the judgment of the lower court and in rendering final judgment against the defendant Railroad Companies, for the reasons assigned in the first three assignments of error.

(See Assignments of Error, pages 6 et seq. of printed record.)

ARGUMENT.

1.

The Supreme Court of Georgia erred in holding that the verdict in this case found upon the first count in the petition, which was based upon the State law, was supported by evidence that the plaintiff was injured in the switching yards of the defendant in the City of Atlanta by an engine and cars of the defendants, which he was engaged in operating for them, without evidence showing affirmatively that the parties were not engaged in interstate commerce.

It is respectfully submitted that this holding was erroneous in view of the fact that Layton had brought his suit in two counts—one under the Federal Law and one under the State Law—and the evidence was absolutely silent as to the character of commerce in which Layton was engaged at the time of his injury. Both the State and the Federal law were the laws of the forum. In such a petition based upon two counts, founded upon different laws, the burden was upon the plaintiff to show by the evidence which law was applicable. This burden he failed to carry. The Federal Law, if applicable, was superior and exclusive. The defendants were entitled to have the Federal Law applied if it was applicable and were entitled to have Layton produce the evidence showing that it was not applicable, if recovery was to be sustained under the first count based on the State Law.

Throughout the trial it was contended by the Railroads that the plaintiff having brought his suit in two counts, based on different laws, must carry the burden of proving those facts which would support the one count or the other under the law applicable to the respective counts. There was no evidence to sustain the verdict of the jury found upon the count based upon the State Law. There was no evidence that the plaintiff and the defendants were engaged

in intrastate commerce at the time of plaintiff's injury. In the absence of such evidence there could not be a legal verdict based upon the count brought under the State Law. Both the State and the Federal Laws are laws applicable to injuries received by railroad employees, their applicability being dependent upon the character of commerce engaged in by the parties at the time of the injury. The one law or the other being applicable, according to the respective character of the commerce engaged in, the burden is upon the plaintiff employee, before he can recover under either law, to show such commerce under one law or the other as will entitle him to recover under the one or the other. There is no presumption as to what character of commerce was being engaged in at the time of his injury. This is a matter of proof. It is a matter to be shown by the evidence. It is a substantive fact capable of proof and necessary of proof by the plaintiff.

The plaintiff chose the manner in which he would bring his suit, and having brought it in two different counts, he always carried the burden of showing by the evidence the substantive fact necessary to make the one or the other count applicable. This he failed totally to do. In the absence of such necessary evidence the jury could not find a legal verdict based upon the first count in the petition. The jury perforce found this verdict despite the absence of such necessary evidence. This verdict being found by the jury perforce in the absence of evidence necessary to make it legal, is such a verdict as to be without evidence to support it and to be contrary to the allegations of the petition and the evidence, and as a result it is a verdict contrary to the law.

The question involved is not as to which law is more favorable to the Railroad Companies. The question is only as to which law is applicable. Did plaintiff have a cause of action under the State or under the Federal Law? He could not have a cause of action under both laws. Either

the one law or the other was applicable to his facts. The plaintiff would have had to prove that he was engaged in interstate commerce in order to recover upon the count based upon the Federal Law. (See *L. & N. R. R. Co. vs. Barrett*, 143 Ga., 742, and *Minn., St. Paul, etc., R. R. vs. Popplar*, 237 U. S., 369). In his suit based upon these two separate counts an equal burden was upon him to prove that he was engaged in intrastate commerce before he could recover under the count based upon the State Law.

The fact that the State Law may have been more favorable to the defendants than the Federal Law did not make the State Law the applicable law.

The decision of this Honorable Court in the case of *Chicago & N. W. R. R. vs. Gray*, 237 U. S., 399, is distinguishable from the present case. In the Gray case there were not two counts, one based on the State Law and one on the Federal Law, and there was therefore no necessity upon the plaintiff to prove facts showing which law was applicable. The present case also differs from the decision of this Honorable Court in the case of *Kansas City Ry. Co. vs. McAdow*, 240 U. S., 51., in the same respect. In the McAdow case there was but one count and the present question as to lack of evidence to sustain one of two counts was not involved.

The present case is again distinguished from the decision of the Supreme Court of Georgia in the case of *L. & N. R. R. Co. vs. Barrett*, 143 Ga., 172, in that in the Barrett case there was but one count, and again the necessity of proof to sustain one of two counts was not involved. The Supreme Court, in this Barrett case says, on page 744:

> "While a widow is authorized to sue under the State Law, the right to sue under the Federal Employer's Liability Act is in the legal representative of the deceased person. There are other differences between the State Law and the Federal Law which need not

be mentioned. A court having jurisdiction to try a case against a railroad company for the homicide of one of its employees can apply the State Law or the Federal Law, accordingly as it might legitimately appear that the employee at the time of the injury was engaged in intrastate or interstate commerce."

Again, on page 745 this Honorable Court says:

"While it was ruled in the cases cited above that it was unnecessary to specially plead the statute, it was not ruled that it was unnecessary to plead facts which might be relied on to show that the case fell within the operation of one statute or the other. Owing to the difference between the State Statute and the Federal Satute and the circumstances under which the one or the other should be applied, facts of this character go to the substance of the case and cannot be judicially recognized as can be the substance of the statute."

It necessarily follows from this decision that if the facts must be pleaded to determine which statute applies, then evidence of these facts must be produced to authorize a legal recovery, and in this respect this Barrett case is authority for our contention.

This Honorable Court in the case of *Minn., St. Paul, etc., R. R. vs. Popplar*, 237 U. S., 369, held in principle that it would have been error to apply the Federal Statute in the absence of proof that plaintiff was engaged in interstate commerce. Based upon the principle decided by this case, we respectfully contend that in this suit based on two counts it was error to apply the State Law without proof that Layton was engaged in intrastate commerce so as to make the State Law the applicable Law.

It is respectfully submitted that this verdict found upon the count of this petition based upon the State Law

was contrary to law, was without the necessary evidence to support it in the respect discussed, and being without such necessary evidence to support it, was not legal, and the Supreme Court of Georgia erred in its judgment complained of in this first assignment of error.

2.

It is respectfully submitted that under the facts in this case the Supreme Court erred in holding that Layton was within the protection and purview of the Federal Safety Appliance Act found in Section 2 of the Act of Congress approved March 2nd, 1893, as amended, which forbids the use by railroads and common carriers subject to such Acts of any car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

The Supreme Court of Georgia in its opinion held that the charges of the trial court on the questions of assumption of risk and contributory negligence, to which charges exceptions were taken by the defendants, did not prejudicially deny the defendants any right connected with the proper presentation of their defenses to the plaintiff's case. These questions were raised in the Supreme Court of Georgia in the writ of error taken from the trial court to the Supreme Court of Georgia, in which complaint was made that the trial court had erred in its charge to the jury in the respects set forth in the third ground of the assignment of errors filed in this Honorable Court. An inspection of these instructions of the trial court will disclose that the trial court in its instructions to the jury squarely brought Layton within the purview and protection of the Federal Safety Appliance Act known as the Federal Automatic Coupling Act, and in such instructions gave him all of the advantages accruing to him on the questions of assumption of risk and contributory negligence, and im-

posed upon the Railroads relative to these defenses all the penalties provided under the law in case of a violation of such Safety Appliance Act.

It is respectfully submitted that the trial court in its instructions on this question, and the Supreme Court in its judgment on this question, erred in holding that under the facts in this case Layton was within either the purview or the protection of this Federal Safety Appliance Act.

The facts in this case disclose that Layton at the time of his injury was upon five coal cars, engaged in the sole task of letting off the brakes upon those cars. He was not engaged in any task in connection with the couplers of the cars. He had nothing to do with the couplers or with the couplings to be made. He had no task in connection with them. His sole task was to let off the brakes of the cars in order that other employees might couple up the cars. Since this plaintiff had no connection with the couplers and no duty to perform with reference to them and no task to be done about them, he was not within the purview of the provision of the Safety Apppliance Law relative to automatic couplers, and not being within the purview or protection of that law, he could not predicate actionable negligence upon a violation of that law. Since the plaintiff was engaged in no task in connection with the couplers or couplings, the duty imposed by the Safety Appliance Law was not a duty owed to him, and since no duty under that law was owed to him in the task which he was performing, the violation of that duty created no actionable negligence against the Railroads as to him. The Automatic Coupling Act imposes a duty for the protection of employees engaged in coupling and uncoupling cars, and is not for the protection of employees except while they are so engaged. This Act is not for the protection of an employee in an entirely different situation and engaged in an altogether different task. The violation of the duty imposed by the Automatic Coupling Act as to one engaged in coupling and uncoupling,

is actionable; as to one engaged in some other task, it is not actionable. In this case Layton was not, in the task in which he was engaged, within the protection of the Act. He was not in a situation where the Act was applicable to him. He was in an altogether different situation. He was on the top of a car engaged in letting off brakes on the car. This Honorable Court has held, in the case of *Johnson vs. Southern Pacific Co.*, 196 U. S., page 1, that the Automatic Coupler Act is for the protection of men engaged in coupling or uncoupling cars and is enacted for the purpose of preventing the necessity of men engaged in coupling or uncoupling cars going between the ends of the car in their work.

Our contention that under the facts in this case Layton was not within the purview or protection of this coupling act seems to have been fully and finally settled by this Honorable Court in the case of *St. Louis & San Francisco Ry. Co. vs. Conarty, Admx.*, 238 U. S., 243. The head notes of this decision are as follows:

> "Where a duty is imposed for the protection of persons in particular situations or relations, a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable."
>
> "The evils against which the coupler provisions of the Safety Appliance Act are directed are those which attended the old-fashioned link and pin couplings, where it was necessary for the man to go between the ends of the car to couple and uncouple. It was not enacted to provide a place of safety between colliding cars."
>
> "An employee of a railroad company not endeavoring or intending to couple or uncouple a car, or to handle it in any way, but riding on an engine that collided with it, is not in a position where the absence

of a coupler and drawbar prescribed by the Safety Appliance Act operates as a breach of duty imposed by that Act for his benefit."

In the decision Mr. Justice Van DeVanter says:

"The principal question in the case is whether at the time he was injured the deceased was in the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with, it would not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations, a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable."

"The Safety Appliance Acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled 'without the necessity of men going between the ends of the cars,' or that is not equipped with drawbars of standard height, the height of the drawbar having, as explained in *Southern Railway vs. Crockett*, 234 U. S., 725, 735, an important bearing on the safety of processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are

directed are those which attended the old-fashioned link and pin coupling, where it was necessary for men to go between the ends of cars to couple and uncouple, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In *Johnson vs. Southern Pacific*, 196 U. S., 1, 19, this Court said of the provision for automatic coupler that 'The risk in coupling and uncoupling was the evil sought to be remedied,' and in *Southern Railway vs. Crockett*, 234 U. S., 725, 737, it was said to be the plain purpose of the two provisions that 'where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that the principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.'"

"We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise."

This decision is manifestly correct. The various safety appliance acts are made for the protection of railroad employees while engaged in certain tasks in connection with their duties. The evidence in this case is confused as to whether these couplers were defective, but whether they were or not, their condition, if defective, was not as to this

plaintiff a condition upon which he could predicate negligence, because under the Statute no duty as to their condition was owed to him, and in the absence of such duty actionable negligence could not arise by reason of the failure of that duty.

Statutes may be enacted for the protection of a certain class of persons. Such a statute is this statute. The only persons who may rely upon that statute are the persons for whose benefit it was enacted. In this case Layton was not such a person as could predicate negligence upon this coupling act. The decisions of other Courts cited by this Honorable Court in the Conarty case all show the principle upon which the decision in the Conarty case is predicated. These decisions all show that a person, to be benefited by an Act, must be one of the persons within the scope of the Act and that only those persons may take advantage of the benefits of the Act enacted for the protection of a certain class who are in that class, and that other persons not so situated are not within the purview and protection of the Act. One decision cited by the Court in this Conarty case is that of *Williams vs. Chicago & Alton R. R. Co.*, 135 Ill., 491. The head note in this case is as follows:

> "In order to a recovery for negligence it is not sufficient to show that the defendant has neglected some duty or obligation existing in common law or imposed by statute, but it must be shown that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect."

And in the decision on page 498 the Court says:

> "It is manifest that the plaintiff in the present case did not belong to the class for whose benefit the railroad companies are required to give the signal. Unquestionably the defendant neglected its duty, but it

neglected no duty which it owed to the plaintiff under the circumstances set up in the declaration."

This was a case where negligence was predicated upon the failure of a railroad to comply with the crossing statute requiring it to ring its bell at crossings, and the plaintiff alleged that its failure to ring the bell at the crossing had frightened a horse in an adjoining field and the horse had injured plaintiff.

The principle clearly deducible from this case is that, while the crossing statute was a valid statute, it was enacted for the benefit of people at a crossing and not for the benefit of a man in an adjoining field, and that under the statute the carrier owed no duty to the man in the field, and owing him no duty, the carrier's neglect to comply with this statute was not negligence as to the man in the field. The man in the adjoining field was not of the class for whose protection the statute was enacted and therefore was not within the purview and protection of the statute.

In another case cited by this Court in the Conarty case, that of *O'Donnell vs. Providence & Worcester R. R.*, 6 R. I., 211, the head note is as follows:

"The fourth section of the 'Act in relation to Railroads' giving an action to anyone injured by the neglect of a railroad company to ring the bell upon their locomotive engine for the distance of at least eighty rods from the place where the railroad crosses any turnpike, highway or public way upon the same level with the railroad and to keep the same ringing until the engine shall have crossed such turnpike, or road, was exclusively designed for the benefit of persons crossing the turnpike, highway or public way on a level with the railroad; and hence, a person who is injured by the engine whilst he is walking along the track of the railroad cannot recover damages against the rail-

road company for such injury upon the ground that the injury was caused by their neglect to ring the bell upon the locomotive as required by the statute."

And in the decision on page 214 the Court says:

"If the defendants have violated any duty owing from them to the plaintiff and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injuries. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, and that, whether the duty be one existing at common law or be one imposed by statute. In order, however to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect."

This case again illustrates the principle pronounced in the Conarty case.

Another case cited by this Honorable Court in the Conarty case is that of *Metallic Impression Casting Co. vs. Fitchburg R. R. Co.*, 109 Mass., 227. The head note of this case is as follows:

"In order to obtain the only available supply of water to throw upon a building on fire, it was necessary to lay a hose across a railroad. The water was supplied from the hose to the fire and had diminished and probably would have extinguished it, but the servants of the railroad corporation ran a train over the hose and severed it and thereby cut off the water from the fire, which then consumed the building. They had notice about the hose and might have stopped the train to permit the hose to be uncoupled. The railroad was

crossed by another at a grade a few hundred feet below the place where the hose was severed, and the train was not stopped before the crossing, as required by the General Statutes, C. 63, Sec. 93. Held, in an action brought by the owner of the building against the railroad company, (1) that the violation of the Statute did not affect the defendant's liability."

This case illustrates the same principle.

Again, in the Conarty case this Honorable Court cites the case of *Martin Favor vs. Boston & Lowell R. R. C.*, 114 Mass., 350, in which case the head note is as follows:

"A railroad corporation whose road passes over a highway by a bridge is not liable to a traveler in the highway for damage caused by fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation knew that because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although they give no warning of the approach of the train."

This case enunciates the same principle.

Again, this Honorable Court in the Conarty case cites the case of *East Tenn., Virginia & Georgia Ry. vs. Feathers*, 78 Tenn., 103, in which the head note is as follows:

"Railroads. Statutory Precautions. The statutory precautions of subsection 3 of Section 1166 of the Code have no application where a person is injured while traveling along a public road near to or parallel with the railroad."

This case was based upon a construction of the Crossing Statute of Tennessee and illustrates the same principle announced in the Conarty case.

All of these cases illustrate that what was being decided in the Conarty case was that Conarty could not recover because he was not at the time of his injury within the protection of the Coupling Act, and that in order for a plaintiff to recover for the violation of the Coupling Act the plaintiff must show that he is within the class of persons protected by that Act and that the defendant has neglected the duty owed to him as one of the persons within the protection of that Act.

In the present case Layton could not recover because he was not one of the class of persons within the protection of that Act, and not being such person the Railroads relative to that Act owed him no duty, and a violation of that Act as to him was not a breach of any duty owed him, and therefore upon such violation actionable negligence could not be predicated.

The same principle as is announced in the Conarty case and the cases cited in the Conarty decision has been repeatedly announced in Georgia. In our State we have the following Crossing Statute, found in Code of Georgia, 1911:

> "Section 2675. A post to be erected. There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of said road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

In construing this Statute our Supreme Court has repeatedly held that it was a statute enacted for the protection of people at a crossing, whether they were approaching the crossing, on the crossing, or just leaving the crossing,

and that in order for actionable negligence to be maintained for a violation of this Crossing Statute the person complaining must have been one of the class to whom a duty was owed at the crossing by the carrier under the provisions of this Statute, in other words, that before negligence could be predicated upon a violation of our Crossing Statute, the party complaining must come within the protection of that Statute.

A citation of two of the authorities of the Supreme Court of Georgia will be sufficient to show that the decisions of our Courts are in line with the decisions quoted from other States and in accord with the principle announced in the Conarty case.

In the case of *Macon Ry. Co. vs. Parker*, 127 Ga., 471, on page 474 the Court says:

> "The injury occurred in the City of LaGrange between two crossings and two hundred and seventy feet from the nearest crossing. Inasmuch as the injury was not upon the crossing, the Court instructed the jury that they could not predicate a finding of negligence upon any failure (if they should find that there was a failure) to observe the blow post law, but in the event of their finding such a failure they could consider it as a circumstance, along with all the facts in the case, in determining whether or not the defendant was negligent."

By this decision it will be seen that our Court, while it allows the violation of the crossing statute to be shown as an indicia of general negligence, does not allow actionable negligence to be predicated upon a violation of that statute except in behalf of someone within the protection of the statute, namely: some party at, upon or just leaving the crossing.

Again, our Court in the case of *Southern Railway Co. vs. Pugh*, 143 Ga., 294, says:

"According to the decisions of this court, relatively to a traveler on a public road at a grade crossing, driving an animal attached to a vehicle, a railroad company is under a duty to obey the requirements of the Civil Code, Sec. 2675, as a precautionary measure to prevent injury resulting from the animal taking fright and running away, when the act of crossing is about to begin, is in progress, or has just been completed. *Bowen vs. Gainesville, etc., R. Co.*, 95 Ga., 688 (22 S. E. 695); *Atlanta, etc., Ry. Co. vs. Durham*, 108 Ga., 547 (34 S. E. 332); *Willingham vs. Macon, etc., Ry. Co.*, 113 Ga., 374 (38 S. E. 843).

"(a) It follows from this construction of the statute, as announced in the cases above cited, that it has no application to a case like the present, where the driver of the vehicle had passed over the crossing and had gone a distance of one hundred and ten feet and had stopped at a store before the train came in sight.

"(b). The case is not controlled by the rulings announced in *Southern Ry. Co. vs. Pope*, 129 Ga., 842 (60 S. E. 157), *Southern Ry. Co. vs. Brock*, 132 Ga., 858 (64 S. E. 1083), and similar cases involving injuries to persons and property run down by an engine on the railroad after passing the blow-post and before reaching the crossing, and not to a traveler on the highway caused by the frightening of an animal driven by him.

"(c) Inasmuch as the defendant owed the plaintiff no duty under the blow-post law, its duty to him with respect to the operation of its train was not different from what it would have been anywhere along the line of railroad where the highway might parallel the

track at a similar distance from it. Relatively to the plaintiff, under the uncontradicted evidence as to the operation of the train and the giving of the station signal, the defendant was acting within its right and was not negligent with respect to him.

"(d). As the uncontradicted evidence showed affirmatively that the blow-post law was not applicable, and that the defendant was operating its train, relatively to the plaintiff, in a manner in which it had a right to do, any presumption of negligence arising against the defendant under the provisions of the Civil Code, Sec. 2780, upon proof of injury (*Georgia So. & Fla. Ry. vs. Shobe*, 142 Ga., 767, 83 S. E. 786), was successfully rebutted."

That the Federal Coupling Act is an Act only for the protection of a certain class and that no duty under that Act is owed to any other person than one of that class, is indicated in the case of *Texas & Pacific Ry. Co. vs. Rigsby*, 241 U. S., 33, where this Court in the first head note says:

"Disregard of the Safety Appliance Act is a wrongful act, and where it results in damage to one of the class for whose benefit it was enacted, the right to recover damages from the party in default is implied. *Ubi jus ibi remedium.*"

Measured by the principle announced in the Conarty case and the other decisions cited as following in principle that case, it is clear that Layton when injured was not within the protection of the Federal Coupling Act. He was neither coupling nor uncoupling. There was no occasion for the presence of the automatic coupler to prevent his going between the cars. He was on top of the cars engaged in an entirely different task, to wit: the task of letting off the brakes. It of necessity follows that if Layton was not

within the purview and protection of the Federal Coupling Act, that Act was not applicable in his case. He could not predicate negligence upon its violation and the trial court in its instructions committed error in giving application in the case to that Act, and the Supreme Court of Georgia in upholding the trial court in its instructions embracing the application of this Act and in holding that those instructions were harmless as to these defendants and in holding that Layton was within the protection of the Act, committed error as to these defendants.

It is respectfully urged, in conclusion, that a judgment of reversal should be entered by this Honorable Court by reason of errors committed by the Supreme Court of Georgia, as set forth in the assignment of errors in this cause and as discussed in this brief for plaintiffs in error.

Respectfully submitted,

H. C. Peeples

P. H. Brewster

E. R. Black.

Reuben McDaniel

Attorneys for Plaintiff in Error.

SUPREME COURT, U.
FILED
APR 2 1917
JAMES D. MAHER

IN THE

Supreme Court of the United States

LOUISVILLE & NASHVILLE R. R. CO., et al.,
Plaintiffs in Error,

v.

O. Y. LAYTON,
Defendant in Error.

No. 840
October Term,
1916.

BRIEF FOR DEFENDANT IN ERROR

MARION SMITH,
Attorney for Defendant in Error.

Johnson-Dallis Co., Printers, Atlanta.

In the Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
Plaintiffs in Error,

vs.

O. Y. LAYTON,
Defendant in Error.

No. 840

October Term, 1916.

BRIEF FOR DEFENDANT IN ERROR

ALLEGED FEDERAL QUESTION BASED ON FEDERAL EMPLOYERS LIABILITY ACT.

The suit is based on two counts, one upon the State Employers Liability statute, and the second count upon the Federal Employers Liability statute. The jury found a verdict based on the first count, namely, the State law. The Federal question attempted to be set up by the Plaintiffs in Error is that the Federal law applied, and that a finding on the State law is unauthorized.

In the motion to dismiss the writ of error and the brief accompanying it, (pages 4, 5, 6 and 7) we pointed out for the Defendant in Error that the State Employers Liability Act under which the verdict was found, is more favorable to railway companies than the Federal statute. Code Sections 2781 and 2782 of the Georgia Code are quoted in full in the brief above referred to and are not now recopied. The brief of the Plaintiffs in Error in opposition to the

motion to dismiss concedes that the Georgia law is more favorable than the Federal statute, but insists that, if the Federal statute applied, the error in applying the Georgia law, which is conceded to be more favorable to them, should nevertheless work a reversal.

This question is absolutely concluded by two decisions of this court which specifically hold that where the law of a state is more favorable to the railway company than the Federal statute, an error in trying a case under the State law, where the Federal statute really applied, is immaterial and will not work a reversal.

Chicago & Northwestern Railway Company vs. Gray, 237 U. S. 399.

Kansas City Railway Company vs. McAdow, 240 U. S. 51.

These two decisions are so clearly controlling that a further discussion of the point is unnecessary.

We, however, call attention to the fact that, as is pointed out in the motion to dismiss, the defendants in the lower court have never taken a definite, unequivocal position as to whether the Federal law or the State law applied to the case. On the contrary they have attempted to defend the count based on the State law by insisting that the Federal statute applied and have at the same time attempted to defend the count based on the Federal law by insisting that the State statute applied; and assignments of error, based on both contentions were contemporaneously presented to the Supreme Court of Georgia.

Also as pointed out in that motion this defense was not pleaded as required by the Georgia practice.

L. & N. R. R. Co. vs. Barrett, 143 Ga., 742.

And the contention is without merit because there was no proof that the paintiff was engaged in interstate commerce.

ALLEGED FEDERAL QUESTION BASED ON SAFETY APPLIANCE ACT.

A brief statement of the way in which this question is made will be helpful to the court. As the verdict is based on the first count under the State Employers Liability Act the second count will be excluded from consideration.

Layton was an employee of the Plaintiffs in Error in the switching yards at Atlanta, Georgia, he being a brakeman working with a switching crew at that point. At the time of his injury he had been sent by this foreman upon a cut of cars standing upon one of the switching tracks for the purpose of releasing all the brakes except one preliminary to a switching operation which was being undertaken by the crew. The plan of this operation was for the engine to couple to these cars after the brakes had been released and to haul them out on to a main line.

Layton did release the brakes and a coupling was attempted, but because of the failure of the automatic couplers to work the coupling did not succeed and the cars instead of being held by the engine, as had been contemplated, were started in motion by the force of the attempted coupling, rolled down the track with Layton on them, and collided with some other cars standing upon the track, causing the plaintiff's injuries.

Without going into detail, it is sufficient to say that the proof authorized a finding that the defendants had failed

to comply with the absolute duty relative to automatic couplers imposed by the Safety Appliance Act. See in this connection:

C., Q. & B. Railroad vs. United States, 220 U. S., 559;

C. R. I. & R. Railroad Co. vs. Brown, 229 U. S., 317;

San Antonio, etc., Railroad Co. vs. Wagner, 241 U. S.,476;

Atlantic City Railroad Co. vs. Parker, decided December 4, 1916, U. S. Advance Opinions, pamphlet No. 4, issued January 15th, 1917, page 69.

We do not understand that this proposition is disputed so no further statement will be made with reference thereto.

The defendants being interstate carriers, all of their cars are within the scope of the Federal Statute.

So. Ry. Co. vs. U. S., 222 U. S., 20.

The allegations of the first count state as one of the acts of negligence the failure of the defendants to furnish couplers as required by the Safety Appliance Act. The defendants have nowhere excepted to the action of the court in submitting this allegation of negligence to the jury, their only exceptions with reference to the Safety Appliance Act relate, not to the plaintiff's effort to predicate negligence on that Act, but to what opposing counsel insist was a ruling of the court in connection with that Act from another standpoint which will be briefly explained.

The State of Georgia has a statute which provides that any employee of a railroad shall not be held to be guilty

of contributory negligence, or to assume the risk in case of any injury "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury."

Code Sections 2783, 2784.

By this statute the State has enacted substantially the same provisions relative to assumption of risk and contributory negligence where a safety appliance statute is violated, as are embraced within the Federal statute on the subject.

In instructiong the jury under the first count on the subject of assumption of risk and contributory negligence, the court instructed them that the Georgia State law provided the exemption from contributory negligence and assumption of risk as defenses where the Safety Appliance statute had been violated. (Transcript of the record, pages 52, 53 and 54.) The only exceptions taken to any action by the trial court which directly or indirectly relate to the Federal Safety Appliance Act are based on the charge of the court in this respect, and are based upon the erroneous assumption that the court's charge instructed the jury that the Federal law contained this exemption from the doctrine of contributory negligence and of assumed risk, and the assignments of error filed in this court complain of this charge of the court upon the ground that "Layton at the time of his injury, was not so engaged, according to the undisputed evidence, as to place him within the purview of the Federal Act."

The complete answer to this assignment of error and to the position of plaintiffs in error in this respect is, that

the trial court did not put the plaintiff within the purview of the Federal Act, but by his charge placed him within the purview of a Georgia State statute, and for this reason no Federal question relative to the Safety Appliance Act is really involved under this record. This proposition has been more fully presented in our brief on the motion to dismiss—see, pages 12, 13, 14, 15, 16, 17, 18, 19 and 20, and the argument is not repeated at this point.

If the defendants had asserted that the court erred in charging the Georgia statute above pointed out, for the reason that the Federal statute exclusively applied, that might have presented a Federal question. No such exception or assignment of error has, however, been made. The exceptions and assignments of error actually made proceeded upon the theory that the trial court charged the jury under the Federal statute as to exemption from assumed risk and contributory negligence, when as a matter of fact nothing of the kind occurred but the charge is specifically based on the Georgia law. The application of the Federal statute is only indirect, namely, as showing a violation of that statute, in which event the court instructed the jury that the Georgia law contained the provisions above referred to. Since there is no question but that the Federal statute was violated, and since there is no contention that its provisions relative to assumption of risk and contributory negligence excluded the Georgia provisions on the subject, and since the court undoubtedly charged the Georgia statute and not the Federal statute, we insist that no question is really involved.

The point is not vital to the merits because the provisions of the State and Federal law are in effect the same, and if

there had been error in selecting the State law it would have been immaterial. The point is, however, vital to the matter of whether any Federal question is involved in the case as heretofore pointed out and as more elaborately stated in the brief on the motion to dismiss.

See:

Miller vs. Anderson, 150 U. S., 132;

Minneapolis, etc., R. R. vs. Popplar, 237 U. S., 369.

MERITS OF ALLEGED FEDERAL QUESTION.

To discuss the merits of this Federal question as set out in the brief of opposing counsel and as applied to the case at bar, we must assume that the instructions of which complaint is made, apply the provisions of the Federal statute relative to the exemption from the defence of contributory negligence and the defense of assumption of risk to the case at bar.

Or else we must assume, as is undoubtedly assumed in the brief of opposing counsel, that there is some exception or assignment of error based on the action of the trial court in submitting to the jury the part of the plaintiff's case in which he predicated negligence on the violation of the Safety Appliance statute. As already pointed out, there is nothing remotely resembling such an assignment of error in this record, and the exceptions taken relate only to the charge of the court which instructed the jury as to the provisions of the Georgia statute relative to assumption of risk and contributory negligence where any safety appliance statute had been violated.

In the balance of this brief, however, the assumption just stated will be made for the purpose of the argument.

Counsel's contention briefly stated is that Layton is not entitled to any benefit under the Federal statute, because he was not immediately between cars attempting to make a coupling. Let us re-state the material facts.

1st. *The plaintiff was engaged in making a coupling.* It is true that he was not between the cars making a coupling by hand. He and the other members of the crew were relying upon the automatic couplers performing their proper functions. The method of making the coupling involved as a necessary part thereof the particular action which the plaintiff was performing, namely, going upon a cut of cars, releasing all the brakes but one, holding the cars with that until the automatic coupling was made, and then releasing the last brake so that the engine could pull the cars away. Layton was as much engaged in attempting to couple cars as the engineer who backed the engine against the string of coal cars. He was as much engaged in the coupling operations, relying upon the automatic couplers to perform their functions, as any member of the crew.

2nd. *The direct, proximate and immediate cause of the collision between the coal cars and the other cars lower on the track (and thereby the cause of the plaintiff's injuries) was the failure of the automatic couplers to work.* About this there can be no question. Had the couplers worked the cars would have been held by the engine and no collision with the lower cars would have occurred. This is not speculative, but certain. It was the plan of operation

contemplated by the entire crew and it miscarried solely because of the defective couplers.

3rd. *The failure on the part of the couplers which is involved, was a failure to perform the functions which they are required to perform and for which they are provided.*

With the foregoing statements in mind, the Court is in a position to consider the proposition now asserted by the learned counsel for the plaintiffs in error, namely, that the failure of the defendants to furnish couplers which would work by impact, as required by the Safety Appliance Act, was not "negligence relative to the plaintiff at the time of his injury, and of which he could complain." This is asserted, notwithstanding the fact that it is manifest under this record that the failure of the couplers to *perform the function required by the Act* was the direct and proximate cause of the plaintiff's injuries, at a time when he was relying upon the compliance by the defendants with the requirements of the Act.

In support of this surprising conclusion the learned counsel for the plaintiff in error rely upon the case of *St. Louis, etc., Railroad Co. vs. Conarty*, 238 U. S. 243. It becomes material, therefore, to ascertain exactly what was decided in that case.

Conarty was killed while riding upon the front of an engine which collided with a loaded freight car. The engine was not attempting to couple with the freight car, and, therefore, of course the deceased was not engaged in any coupling operation. The absence of the Safety Appliance couplers did not cause the collision, which was entirely unforseen. The decedent's Administratrix, however, alleged

that had there been upon the engine and cars the Safety Appliance couplers required by law they would have projected sufficiently from the end of the engine and cars to have held the same apart at the time of the collision and thereby have furnished protection to the deceased. This Court held that the Safety Appliance couplers were intended to hold cars together, not to hold them apart, and that the failure to hold them apart was not one of the things provided against in the Act. It is submitted that this conclusion is almost self evident. The death of the deceased in that case was not due to a failure of the Safety Appliances to perform the functions for which they are provided, but was due to their failure to perform entirely different functions, never contemplated by the law.

In stating the facts Mr. Justice Van De Vanter said:

> "Had these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated."

He further says: "It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions." The reference here is to the provisions of the Safety Appliance Act. The importance of this particular quotation as applied to the present case is found in the fact previously pointed out that the collision which resulted in Layton's injury was proximately and directly attributable to a violation of the Safety Appliance Act. The Court further says: "We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car, or to handle it in any way but

was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit."

These quotations make it clear that the Court did not hold that a person relying upon Safety Appliances performing their regular functions, and whose injury is directly and proximately attributable to their failure to work cannot allege such failure as negligence.

Conarty was not attempting to couple or handle the cars; he was not relying upon the automatic couplers performing their function of coupling; he was not injured by the failure of the automatic appliances to perform their functions, to-wit, to couple cars. The contrary of each of these statements is the fact in Layton's case. What caused Conarty's injury was a collision in no way connected with the Safety Appliances, but the results of which it was claimed might have been avoided had the Safety Appliances performed a function for which they were never designed, namely, to hold cars apart. As distinguished from this, Layton's injury was directly attributable to the failure of the Safety Appliances to couple the cars and hold them together. The basis, therefore, on which the Supreme Court decided the Conarty case requires the conclusion that Layton was entitled to the benefit of the Act.

Undoubtedly one evil against which the Safety Appliance Act was aimed was the necessity for going between cars to make couplings. It by no means follows, however, that the only class of persons who can complain of the violation of the Act are those who go between cars. Such a limitation is without authority and unsound. A particular method of guarding against this evil was provided, namely, to equip

the cars with couplers which would couple automatically. This is the function which the statute requires the couplers to perform. Any one entitled to rely on the couplers performing this function, and so relying and whose injury is directly attributable to the failure of the couplers to perform such function is within the protection of the Act. Layton was in this position, and Conarty was not.

The Safety Appliance statute in effect says to employees: "You need not go between cars to make couplings, but may rely upon the appliances coupling automatically." An employee acts upon this assurance and is injured in consequence of the failure of the couplers to perform this function. The statute has told him he need not go between the cars. The Court is now asked to say to him that he is not within the protection of the statute because he did not go between the cars. An analysis of the proposition is also a complete answer.

Our position in this respect is supported by the only cases in point.

In *Chicago, etc., Railroad Co. vs. King*, 169 Fed. 372, the Circuit Court of Appeals for the seventh circuit held that the Safety Appliance Act was not limited to those engaged in coupling cars, but applied to any one whose injury was proximately caused by a violation of the Act.

This decision was affirmed by the Supreme Court of the United States in 222 U. S. 222; 56 Law. Ed. 176. The Court did not discuss this particular question, but merely remarked that while the case was founded on the Safety Appliance Act, it was obvious that it did not involve any

substantial question as to the meaning and application of the Act, and that apparently no error in this respect had been committed.

In the King case the Circuit Court of Appeals said:

> "We find nothing in the statute that limits the classes of persons for whom carriers shall be responsible for damages that result directly and immediately from its illegal doings."

This expression is quoted with approval by the Circuit Court of Appeals of the Eighth Circuit in *Johnson vs. Great Northern Railway Company*, 178 Fed. 643, where a similar ruling was made, and the Court adds, referring to the King case:

> "We think the proper construction of the Act is applicable to all servants of the carrier who are injured while acting in the performance of their duty in and by the operation of the cars where the proximate cause of the injury is the movement of a car in interstate commerce with a defective coupler."

Undoubtedly the Conarty case limits the right of action based on the Safety Appliance Statute to those cases in which the injury is due to the failure of the safety appliances to perform the function for which they are provided. It is difficult to see how any one could have questioned this; but the Court will bear in mind that there is no authority for any further limitation, and that the direct cause of Layton's injury was the failure of the safety appliances in this particular respect.

In the recent case of *Texas & Pacific Ry. Co. vs. Rigby*, 241 U. S. 33, this Court has fully examined the principles which give rise to a private cause of action under this statute notwithstanding the fact that no cause of action is expressly provided for. The Court finds that such cause of action arises from the principle stated in 1 Comyn's Digest, title "Action upon Statute," as follows:

> "So in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

It is beyond any question clear under this record that the failure of the safety appliances to perform their regular functions was the proximate cause of Layton's injury. Is it not equally clear that he was in a position where the statute must be said to have been enacted for his benefit?

The act is entitled "An Act to Promote the Safety of Employees, Travelers, etc." Layton was an employee. This, of course, is not conclusive, because, as pointed out in Conarty's case, the statute is to protect employees "in particular situations or relations," and the mere fact that Layton was an employee would not be conclusive unless he was in a "situation or relation" in which the statute was designed for his protection.

His "situation or relation" at the time of his injury was that of an employee engaged with the rest of his crew in the coupling operation. The record is conclusive on this, and it is so found as a matter of fact by the Supreme Court of Georgia. In the fourth head-note the Supreme Court

says in effect that he was a brakeman "whose duty it is to assist in the coupling of cars" and that he was injured "in the discharge of his duties connected with making up trains." His "situation or relation" may be further described by adding that in performing his duties of coupling cars and making up the train, he was following the method pointed out by the statute and relying upon the automatic couplers operating as they are required by the statute to operate, and was injured because of their failure in this respect.

It must be conceded that the act is for the protection of employees handling the cars of interstate carriers. It must be conceded that Layton was relying upon the couplers performing the function required by law; and it must be further conceded that his injury was directly attributable to their failure in this respect. In its last analysis therefore the position of opposing counsel amounts to a request to this Court to hold that an employee of an interstate carrier, who is engaged in coupling cars, and in making up of a train, not by going between cars, but by attempting to use the safety appliances automatically as required by the statute, is not in the "situation or relation" where the statute was designed for his benefit or protection.

No authority can be presented for this proposition. On the contrary this is the exact situation in which the statute designed employees to have the benefit of the law. An employee going between cars when the couplers fail to work is of course protected by the statute; but the real design of the statute is for employees not to go between cars, but to rely upon the automatic couplers, as Layton relied upon

them. He was in the exact relation and situation which the statute contemplated his occupying, and his injury is directly attributable to the failure of the coupling devices while using them in the manner provided by the statute.

Respectfully submitted,

MARION SMITH,

Attorney for defendant in error.

THE case is stated in the opinion.

Mr. Sanders McDaniel, with whom *Mr. H. C. Peeples*, *Mr. P. H. Brewster* and *Mr. E. R. Black* were on the briefs, for plaintiffs in error.

Mr. Marion Smith for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The plaintiff below was a switchman in the employ of the defendants when he suffered the injury for which he recovered the judgment which was affirmed by the Supreme Court of Georgia, and which is here for review on writ of error.

The facts essential to an understanding of the question presented for decision are as follows:

A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars but struck them with such force that, although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track, with the result that his right arm was crushed by the wheels and was amputated below the elbow.

The recovery in the case was on the first count of the petition, which alleges that the defendants were carriers of interstate commerce and that they were negligent, among other things, in permitting the use of the car attached to the engine and of the car to which the attempt was made to couple it, without such cars being equipped

with automatic couplers, which would couple by impact, as required by law, the claim being that if the cars had coupled when they came together the five cars of coal would not have run down against the others, causing the shock which threw the plaintiff under the wheels.

The purpose of this allegation with respect to automatic couplers was to make applicable to the case the Georgia Employers' Liability Act, which provides that an injured employee shall not be held guilty of either contributory negligence or of having assumed the risk when the violation of any statute enacted for his safety contributed to his injury.

The defendants admit that they were interstate carriers of commerce and that the plaintiff was in the performance of his duty when he was thrown from the car, as he claims, or fell, as the defendants claim, but they deny all allegations of negligence.

On this state of pleading and of fact the court charged the jury that before the plaintiff could recover on his allegation that the cars were not properly equipped with automatic couplers "he must have shown to your satisfaction by a preponderance of the evidence" either that the cars had never been equipped with proper couplers or that, if they had been so equipped, they were in such condition that they would not couple automatically by impact and that such failure to so equip them contributed to cause the injury.

Upon this charge of the court the verdict was against the defendant and on it is based the only claim of error of sufficient substance to be noticed.

It is admitted by the defendants that the reference in the Georgia Employers' Liability Act to "any statute enacted for the safety of employees" is to the Federal Safety Appliance Act and that the charge is a proper one if that act, as amended, is applicable to a switchman engaged as the plaintiff was when he was injured, but the

claim is that it is not so applicable because it is intended only for the benefit of employees injured when between cars for the purpose of coupling or uncoupling them. This claim is based wholly upon the expression "without the necessity of men going between the ends of cars," following the automatic coupler requirement of § 2 of the Act of 1893, and it is urged in argument that this case is ruled by *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243. In that case, however, it was not claimed that the collision resulting in the injury complained of was proximately attributable to a violation of the Safety Appliance Acts, and therefore the claim made for it cannot be allowed.

The declared purpose of the Safety Appliance Act of 1893 (c. 196, 27 Stat. 531), and of the amendatory Acts of 1903 and of 1910 is "to promote the safety of employees . . . upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers . . . and for other purposes," and at the time the plaintiff was injured these acts made it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not so equipped. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439. By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers and if the defendant railroad companies used cars which did not comply with the standard thus prescribed they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Illinois Central R. R. Co.* v. *Williams*, 242 U. S. 462.

While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty. The jury found that the plaintiff's case came within this interpretation of the statute and the judgment of the Supreme Court of Georgia must be

Affirmed.